Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to decisions of other courts of appeals and this Court's decision in *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), that the federal government has the statutory and constitutional authority to regulate "non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water."

2. Whether a consent decree between private citizens and an agency of the federal government is subject to rescission as void *ab initio* where the federal government never had statutory or constitutional authority to regulate the subject matter of the decree.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 5

I. THE SEVENTH CIRCUIT'S MISCONSTRUCTION OF *SWANCC* CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT THERE IS NO FEDERAL AUTHORITY TO REGULATE ISOLATED, INTRASTATE WATERS HAVING NO SIGNIFICANT CONNECTION TO NAVIGABLE WATERS. 6

A. CWA § 404 And The Court's Decision In *SWANCC*. 7

B. The Federal Courts Are Deadlocked As To Whether Isolated, Non-navigable, Intrastate Waters Are Subject To Federal Regulation Under CWA § 404. 9

C. The Seventh Circuit's Holding Is Inconsistent With This Court's Decision In *SWANCC*. 15

TABLE OF CONTENTS-Continued

Page

II. THE SEVENTH CIRCUIT ERRED IN REFUSING TO RESCIND THE CONSENT DECREE AS VOID *AB INITIO* DUE TO THE GOVERNMENT'S LACK OF REGULATORY AUTHORITY. 19

A. Private Citizens Cannot Contractually Expand A Federal Agency's Statutory And Constitutional Authority. 20

B. This Court's Decisions And Those Of Other Courts Of Appeals Confirm That Consent Decrees Are Void *Ab Initio* And Subject To Rescission Where The Government Had No Authority To Execute Them. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: **Page**

Adams Fruit Co. v. *Barrett*, 494 U.S. 638 (1990) 21

Augusta Aviation, Inc. v. *United States*, 671 F.2d 445 (11th Cir. 1982) 25

Bennett v. *Hedglin*, 995 P.2d 668 (Alaska 2000) 26

Bergstrom v. *Estate of DeVoe*, 854 P.2d 860 (Nev. 1993) 26

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 20

Brace v. *United States*, 51 Fed. Cl. 649 (2002) 13

Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 20

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 20

Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 22, 23

The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1869) 23

Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) 12, 13

Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) 18

Hughes v. *United States*, 342 U.S. 353 (1952) 22

TABLE OF AUTHORITIES-Continued

Page

Idaho Rural Council v. *Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001) 13

Keith v. *Volpe*, 118 F.3d 1386 (9th Cir. 1997) 21

Kelley v. *Town of Milan*, 127 U.S. 139 (1888) 24

Klopp v. *Keystone Ins. Cos.*, 595 A.2d 1 (Pa. 1991) 26

League of United Latin Am. Citizens v. *Clements*, 999 F.2d 831 (5th Cir. 1993) 21

Local Number 93, Int'l Ass'n of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986) 21, 22

National Revenue Corp. v. *Violet*, 807 F.2d 285 (1st Cir. 1986) 22

Needham, In re, 279 B.R. 515 (Bankr. W.D. La. 2001) 11

Orange v. *District of Columbia*, 59 F.3d 1267 (D.C. Cir. 1995) 24

Rapanos v. *United States*, 533 U.S. 913 (2001) 16

REW Enters. v. *Premier Bank, N.A.*, 49 F.3d 163 (5th Cir. 1995) 25

Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) 11, 14

TABLE OF AUTHORITIES-Continued

Page

Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... *passim*

Schism v. *United States*, __ F.3d __, 2002 WL 31549178 (Fed. Cir. Nov. 18, 2002) (en banc) 24

Total Med. Mgmt., Inc. v. *United States*, 104 F.3d 1314 (Fed. Cir. 1997) 25

Tuxedo Cheverly Volunteer Fire Co. v. *Prince George's County*, 385 A.2d 819 (Md. Ct. Spec. App. 1978) 26

United States v. *Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986) 24

United States v. *Armour & Co.*, 402 U.S. 673 (1971) 22

United States v. *Beebe*, 180 U.S. 343 (1901) 23, 24

United States v. *Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) 13

United States v. *Interstate General Co.*, 2002 WL 1421411 (4th Cir. July 2, 2002) 10

United States v. *Interstate General Co.*, 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd*, 2002 WL 1421411 (4th Cir. July 2, 2002) 15, 19

TABLE OF AUTHORITIES-Continued

Page

United States v. *ITT Cont'l Baking Co.*, 420 U.S. 223 (1975) 22

United States v. *Lamplight Equestrian Center*, 2002 WL 360652 (N.D. Ill. Mar. 8, 2002) 13, 14

United States v. *Newdunn Assocs.*, 195 F. Supp. 2d 751 (E.D. Va. 2002) 11

United States v. *Ownbey Enters., Inc.*, 789 F. Supp. 1145 (N.D. Ga. 1992) 19

United States v. *Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) 11, 17

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 5, 7, 17

United States v. *RMG Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002) 11

United States v. *Rueth Dev.*, 189 F. Supp. 2d 874 (N.D. Ind. 2002) 13, 19

Williams v. *Metzler*, 132 F.3d 937 (3d Cir. 1997) 21

Statutes, Regulations, and Rule:

33 U.S.C. § 1311(a) 2, 7

33 U.S.C. § 1344 ..... *passim*

TABLE OF AUTHORITIES-Continued

Page

33 U.S.C. § 1344(a) 7

33 U.S.C. § 1362(7) 7

33 U.S.C. § 1362(12) 7

33 C.F.R. § 328.3(a) 4, 7, 10

Fed. R. Civ. P. 60(b)(5) 3

Miscellaneous:

2 FARNSWORTH ON CONTRACTS § 5.1 (2d ed. 1998) 25

51 Fed. Reg. 41,206 (Nov. 13, 1986) 7

Michael Gerhardt, *On Revolution and Wetland Regulations*, 90 GEO. L.J. 2143 (2002) 11

Protecting Wetlands, WASH. POST, Sept. 27, 2002, at A22 14

Trip Van Nippon, *Current Developments in Clean Water Act Litigation*, SG101 ALI-ABA 104 (2002) 15

12 WILLISTON ON CONTRACTS § 35:63 (4th ed. 1999) ... 25

PETITION FOR A WRIT OF CERTIORARI

Robert R. Krilich *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-16a) is reported at 303 F.3d 784. The judgment of the district court (App., *infra*, 17a-33a) is reported at 152 F. Supp. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1311, 1344, 1362 are reproduced at App., *infra*, 75a-76a. Article 1, § 8, cl. 3 of the United States Constitution provides, in pertinent part, that "[t]he Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

STATEMENT

1. This case arises out of a Consent Decree entered by the United States District Court for the Northern District of Illinois on October 29, 1992. The Decree resolved an enforcement action by the EPA regarding petitioners' alleged improper filling of 4.5 acres of wetlands on their property ("petitioners' Waters" or "Waters").

The Waters are located entirely within the State of Illinois, are non-navigable and isolated. The nearest non-navigable water body, Salt Creek, is located 1.9 stream miles away from the property, and the nearest navigable water, the Des Plaines River at Hoffman Dam, is located 19.1 stream miles away.

App., *infra*, 71a-72a. In order for any runoff from the property to reach the Des Plaines River at Hoffman Dam, it must travel into a manhole with an open grate, which connects to a "manmade, underground, concrete storm sewer system," which runs 2000 feet east and then flows into a small ditch that joins non-navigable Salt Creek about 1.5 miles further east. *Id.* at 71a. Salt Creek then joins the Des Plaines River approximately 16.5 stream miles to the Southeast. *Ibid.* The government alleges that petitioners filled these Waters without a permit in violation of Sections 404 and 301(a) of the Clean Water Act, 33 U.S.C. §§ 1344, 1311(a).

In the Consent Decree, the parties stipulated that certain of the Waters are "waters of the United States," and that the EPA thus had jurisdiction to regulate them. App., *infra*, 38a-39a. The Decree obligated petitioners to conduct restoration and mitigation activities. It remains in force to this day, and its use restrictions continue. In the Decree, the district court also "retain[ed] jurisdiction in order to enable any party to apply to the Court at any time for such further relief as may be necessary to interpret, enforce, or modify this Decree." *Id.* at 35a.

When petitioners were unable to meet the deadlines in the Decree, the government moved to enforce its penalty provisions. On May 31, 1996, the district court entered an order imposing a substantial fine on petitioners. 948 F. Supp. 719 (N.D. Ill. 1996). The court of appeals affirmed the penalty in part but remanded for recalculation of the amount. 126 F.3d 1035 (7th Cir. 1997). The district court entered a modified judgment in the amount of $1,257,500 on December 1, 1997. These fines and penalties remain on deposit in a judicially supervised escrow account.

2. On January 9, 2001, this Court announced its decision in *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 167-168, 171-172 (2001) ("*SWANCC*"), that § 404 of the Clean Water Act ("CWA") does not extend "to ponds that are not adjacent to open water,"

and instead extends to waters that "actually abu[t] on a navigable waterway." Based on *SWANCC*, petitioners promptly moved to vacate the Consent Decree, invoking the district court's powers under the Decree's reservation-of-jurisdiction clause and, alternatively, under Fed. R. Civ. P. 60(b)(5).

In support of their motion, petitioners submitted the Report of an environmental expert who testified, among other things, that petitioners' Waters: (1) have "no natural connection to any navigable waterway"; (2) are located 19.1 stream miles away from the nearest navigable body of water; and (3) "would have no measurable effect" on the nearest navigable or non-navigable water "in terms of wildlife habitat, stormwater retention, flood flow attenuation and water purification" even if they were *completely* filled. App., *infra*, 71a, 74a.

The government did not challenge any of these factual findings, despite the district court's invitation to do so. The district court thus assumed for purposes of its decision that "the waters at issue actually are nonnavigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water." App., *infra*, 22a. Nonetheless, the district court denied petitioners' motion to vacate, holding that the court was powerless to vacate or modify the Consent Decree, and that petitioner was bound by the Decree, even if the Waters were "isolated" under *SWANCC*, because petitioner had stipulated to the government's regulatory jurisdiction in the Decree.

The Seventh Circuit affirmed. Like the district court, the court of appeals assumed "that all waters at issue were nonnavigable, isolated wetlands with no surface connection to the nearest stream or nearest navigable body of water." App., *infra*, 10a. The court rejected petitioners' contention, however, that *SWANCC* "removed from the [Army Corps of Engineers'] regulatory authority all waters that are not adjacent to bodies of open water." *Id.* at 13a. In the court's view, "the precise holding of *SWANCC* was not so broad." *Ibid.* Instead, the

Seventh Circuit concluded that "in *SWANCC*, the Supreme Court merely held that the definition of 'waters of the United States' under 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, 'exceeds the authority granted to [the Corps] under § 404(a) of the CWA.'" App., *infra*, 13a (quoting *SWANCC*, 531 U.S. at 174).

According to the Seventh Circuit, *SWANCC* shed no light on the question of whether the CWA extends to isolated waters not adjacent to navigable waters because "*SWANCC* in no way altered the other regulations interpreting 'waters of the United States.'" App., *infra*, 14a. Because "[t]here is nothing in the Consent Decree establishing that the Migratory Bird Rule was the sole basis for the EPA's assertion of authority over [petitioners'] property," the court of appeals concluded that "[t]he *SWANCC* decision does not establish that the Government exceeded its authority in entering into the Consent Decree, so [petitioners'] claim that the Decree was void *ab initio* fails as well." *Id.* at 13a-14a, 16a.

Finally, the Seventh Circuit held that "even assuming that the wetlands were isolated, Krilich is nonetheless bound by the Consent Decree" because "he already agreed that the waters were 'waters of the United States.'" App., *infra*, 10a, 13a. As the court of appeals explained:

> If a party believes that the waters at issue on his own property are not properly subject to the EPA's authority * * *, he should not stipulate otherwise. But that is exactly what Krilich did, to his continued dismay. He expressly agreed that certain waters on his property constituted "waters of the United States," subject to regulation by the EPA.

App., *infra*, 14a-15a. Thus, according to the Seventh Circuit, petitioners would be bound by the Consent Decree, and their property thus subject to continued federal regulation, even if the

federal government never had any statutory or constitutional authority to regulate petitioners' Waters.

REASONS FOR GRANTING THE PETITION

This case presents the important and recurring question of whether the United States government has the statutory and constitutional authority to regulate isolated, intrastate waters that are not directly adjacent to any navigable body of water, and have no significant connection to any navigable waters. This Court has addressed this issue twice, once in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and again, more recently, in *SWANCC*.

Nevertheless, the courts of appeals and district courts are hopelessly split over the meaning of *SWANCC* and *Riverside Bayview* and the extent to which the federal government has jurisdiction to regulate the nation's intrastate waters. This case presents the ideal opportunity to resolve this split. Both the district court and the Seventh Circuit found, for purposes of their decisions, that the Waters in this case were "nonnavigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water." This case therefore squarely presents the naked legal question of whether the federal government has the statutory and constitutional power to regulate intrastate waters that have no significant connection to any navigable body of water, *irrespective* of the Migratory Bird Rule. As the cases cited herein confirm, the federal courts repeatedly have confronted this question in the 2 years since *SWANCC* was decided, but have not been able to reach a consensus. Only this Court can break the deadlock.

This case also presents the separate and far-reaching question of whether a Consent Decree between the federal government and a private citizen is subject to rescission where the federal government never had jurisdiction to regulate the subject matter of the Decree. In this case, the Seventh Circuit held that even if the EPA *never* had authority to regulate the

Waters in question, petitioners are nevertheless bound by the Decree because they stipulated to the EPA's regulatory authority, thus allowing the EPA to bootstrap itself into jurisdiction that neither Congress nor the Constitution has conferred upon it. That holding not only flies in the face of this Court's administrative law decisions that private citizens cannot contractually expand the regulatory jurisdiction of federal agencies, but the multiple holdings of this Court and lower federal courts that repeatedly have rescinded consent decrees as void *ab initio* where it was found that the federal agency had no authority to execute them in the first place.

I. THE SEVENTH CIRCUIT'S MISCONSTRUCTION OF *SWANCC* CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT THERE IS NO FEDERAL AUTHORITY TO REGULATE ISOLATED, INTRASTATE WATERS HAVING NO SIGNIFICANT CONNECTION TO NAVIGABLE WATERS.

The Seventh Circuit below held that despite this Court's holding in *SWANCC*, the federal government continues to have the statutory and constitutional authority to regulate isolated, non-navigable, intrastate waters. Indeed, here the Waters have "no natural connection to any navigable waterway," are located 19.1 stream miles away from the nearest navigable body of water, and "would have no measurable effect" on *any* navigable body of water. This decision squarely raises the very issue that this Court confronted in *SWANCC*, *i.e.*, whether the federal government, as opposed to the *states*, has the power to regulate intrastate waters that are neither adjacent to nor have any significant effect upon any navigable waters. As *SWANCC* itself confirmed, this fundamental question implicates not only far-reaching issues of land use development and ecology, but also "significant constitutional and federalism questions." 531 U.S. at 174.

A. CWA § 404 And The Court's Decision In *SWANCC*.

The CWA prohibits "any person" from discharging "any pollutant," including "dredged or fill material," into "the navigable waters" without obtaining a permit from the Army Corps of Engineers (the "Corps"). 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). "Navigable waters" are defined in the CWA to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The Corps, in turn, has defined the term "waters of the United States" in § 404 of the CWA, 33 U.S.C. § 1344, to include not only traditional "navigable waters," but also

> waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.

33 C.F.R. § 328.3(a).

In 1986, the Corps further expanded the reach of its jurisdiction by defining "other" waters pursuant to what is known as the "Migratory Bird Rule":

> EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines * * * .

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court held that § 404 gives the government jurisdiction over non-navigable wetlands immediately adjacent

to open bodies of navigable water. The Court reaffirmed that holding in *SWANCC* but made clear that federal authority to regulate adjacent wetlands must be strictly circumscribed, particularly in light of Commerce Clause concerns:

> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water."

SWANCC, 531 U.S. at 167. The Court thus confirmed that *Riverside Bayview* permits federal regulation only of wetlands *immediately* adjacent to navigable waters, such as waters that "actually abutted on a navigable waterway":

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 168.

By using the term "navigable waters" in the CWA, the Court explained, Congress intended only to "exert * * * its commerce power over navigation":

> The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

SWANCC, 531 U.S. at 168 n.3, 172. The Court accordingly rejected the claim that

> isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as

> habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute * * * does not have any independent significance."

Id. at 171-172 (omission in original). While acknowledging its statement in *Riverside Bayview* that "the word 'navigable' in the statute was of 'limited effect,'" the Court cautioned that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.* at 172.

Finally, the *SWANCC* Court emphasized that its holding on the scope of § 404 jurisdiction was meant "to avoid the significant constitutional and federalism questions raised by" expansion of federal jurisdiction to cover purely local, intrastate waters. *Id.* at 174. Those very concerns are raised again by the court of appeals' holding below.

B. The Federal Courts Are Deadlocked As To Whether Isolated, Non-navigable, Intrastate Waters Are Subject To Federal Regulation Under CWA § 404.

The federal courts are deeply divided over the scope and meaning of CWA § 404 following this Court's decision in *SWANCC*, particularly over the extent to which federal agencies can regulate intrastate waters that are neither immediately adjacent to navigable waters nor have any significant effect on any navigable waters. In fact, the federal courts have divided into at least three distinct and irreconcilable camps.

1. The Seventh Circuit's decision below reflects the first of these approaches, holding that *SWANCC* was limited to its facts, and that "non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water" *are* subject to federal regulation so long as regulators do not rely solely on the now-overturned Migratory Bird Rule. Put another way, in the view of the Seventh Circuit,

the federal government can continue to assert federal jurisdiction over isolated, intrastate waters so long as it does not explicitly rely on the Migratory Bird Rule as the jurisdictional predicate. According to this view, if the government in *SWANCC* had asserted any additional basis for jurisdiction (*e.g.*, 33 C.F.R. § 328.3(a)(3), (a)(5) or (a)(7)), the court of appeals' decision in that case would have been affirmed.

The Seventh Circuit's decision follows a similar ruling by the Fourth Circuit in *United States* v. *Interstate General Co.*, 2002 WL 1421411 (July 2, 2002), which likewise held that *SWANCC* addressed only the validity of 33 C.F.R. § 328.3(a)(3), "as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,'" and did not generally address the extent to which federal agencies may regulate isolated, intrastate waters.

2. The Fifth Circuit, agreeing with Justice Stevens' interpretation of the majority opinion in *SWANCC*, has adopted a different approach, interpreting *SWANCC* to articulate a bright line test for § 404 jurisdiction. In his dissent, Justice Stevens observed that "[i]n its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." 531 U.S. at 176-177 (dissenting opinion). Justice Stevens also noted that *SWANCC* had the effect of excluding from federal regulation tributaries and wetlands that are neither contiguous nor adjacent to navigable waters from the scope of Section 404. *Id.* at 189 n.14 (dissenting opinion). Accordingly, he concluded that *SWANCC* extended § 404 jurisdiction only to navigable-in-fact

waters, primary tributaries to navigable-in-fact waters, and adjacent wetlands.[1]

The Fifth Circuit and a growing number of district courts agree with this broader reading of the majority opinion in *SWANCC* and thus have fashioned a bright-line jurisdictional rule in which "a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 265, 268-71 (5th Cir. 2001);[2] see also *In re Needham*, 279 B.R. 515, 518 (Bankr. W.D. La. 2001) (same); *United States* v. *Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (holding that wetlands that "were not directly adjacent to navigable waters" were beyond government's reach); *United States* v. *Newdunn Assocs.*, 195 F. Supp. 2d 751, 767-768 (E.D. Va. 2002) (agreeing with dissent's characterization of *SWANCC* as excluding "wetlands and tributaries that are not contiguous or adjacent to navigable waters" from Corps's grasp and finding that wetlands at issue were not "adjacent to navigable waters by any reasonable definition of adjacency"); *United States* v. *RMG Corp.*, 222 F. Supp. 2d 780, 788-789 (E.D. Va. 2002) (holding that wetlands not adjacent to closest navigable waterway were outside federal jurisdiction); Michael Gerhardt, *On Revolution and Wetland Regulations*, 90 GEO. L.J. 2143, 2154 (2002) (interpreting

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[1] Justice Stevens stated that *SWANCC* "excised" "Phase 3" waters (described as all waters other than navigable-in-fact waters, their primary tributaries and wetlands adjacent/contiguous to each) from the scope of the CWA. *SWANCC*, 531 U.S. at 189 n.14 (dissenting opinion); see also *United States* v. *Newdunn Assocs.*, 195 F. Supp. 2d 751, 763 (E.D. Va. 2002).

[2] The actual holding in *Rice* reads *SWANCC* even more ambitiously. The Fifth Circuit held that Big Creek did not qualify as a "navigable water" within the meaning of the CWA, despite the fact that "Big Creek runs across the ranch to the Canadian River," a navigable-in-fact water. 250 F.3d at 265. The *Rice* court thus found that even a primary tributary is not a "navigable water" subject to CWA jurisdiction.

SWANCC as holding that "waters that are neither navigable waters nor adjacent to navigable waters are simply not within the Corps's jurisdiction").

This second approach—that all waters not immediately adjacent to a navigable water (or at least not abutting onto a primary tributary of a navigable water) are beyond the limits of federal regulatory authority—squarely conflicts with the Seventh Circuit's position that "non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water" are still within the reach of federal regulators even after *SWANCC*.

3. Other federal courts have rejected the view of the Seventh Circuit and the bright-line test adopted by the Fifth Circuit in favor of an "effects" tests that asks whether the waters in question have a significant connection to, or effect upon, a navigable body of water. This view, endorsed by the Ninth Circuit and various district courts, is equally at odds with the Seventh Circuit's holding below.

For instance, in *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), the Ninth Circuit held that certain irrigation canals were "waters of the United States" within the meaning of the CWA. In reaching its decision, the Ninth Circuit found that the canals were not "isolated" within the meaning of *SWANCC* because the introduction of pollutants into the canals had a deleterious effect on waters of the United States. *Id.* at 533-534. The Ninth Circuit found that

> [b]ecause the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other "waters of the United States." * * * The Clean Water Act is concerned with the pollution of tributaries as well as with the

> pollution of navigable streams, and "it is incontestable that substantial pollution of one not only may but very probably will affect the other."

Ibid.[3]

Other lower courts have endorsed this same approach. See, *e.g.*, *United States* v. *Lamplight Equestrian Ctr.*, 2002 WL 360652, at *6 (N.D. Ill. Mar. 8, 2002) (after *SWANCC*, "the critical issue is whether there is a 'significant nexus' between the Property's wetlands and the Fox River [the navigable water]"); *United States* v. *Rueth Dev.*, 189 F. Supp. 2d 874, 877-878 (N.D. Ind. 2002) (finding that relationship between wetlands and navigable water was "direct" and that property "has the 'significant nexus' to a navigable waterway necessary to trigger Army Corps of Engineers jurisdiction under CWA § 404(a)"); *Brace* v. *United States*, 51 Fed. Cl. 649 (2002) (focusing on whether "nexus" exists between wetlands and navigable water); *Idaho Rural Council* v. *Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001) (waters were "sufficiently connected" via surface water to navigable water to be subject to federal jurisdiction); *United States* v. *Buday*, 138 F. Supp. 2d 1282, 1290 n.14 (D. Mont. 2001) (since no one disputed adjacency, court analyzed effect tributary had on navigable water and found that it was "significant" and that its water quality was vital to that of navigable water).

Under this "effects" approach, a court assessing the limits of § 404 jurisdiction must determine whether the waters in dispute have a "significant nexus" with a navigable water body. While obviously distinct from the bright-line test endorsed by

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[3] *Headwaters* involved neither the Migratory Bird Rule nor § 404 of the CWA. It concerned § 402 of the CWA and an irrigation district's alleged discharge of herbicides without an NPDES permit. The mere fact that the Ninth Circuit addressed *SWANCC* in a non-section 404 case thus confirms its disagreement with the Seventh Circuit's narrow reading of that decision.

the Fifth Circuit in *Rice*, this approach stands equally and irreconcilably in conflict with the Seventh Circuit's narrow reading of *SWANCC* below.

The Seventh Circuit held that petitioners' Waters are subject to continuing federal control under *SWANCC* even though they are not adjacent to *any* navigable body of water and lack a significant nexus to any navigable waters. In the Seventh Circuit's view, both of these facts are irrelevant simply because the federal government did not rely exclusively on the Migratory Bird Rule. Whichever approach one favors, the circuit split over this important issue is both significant and undeniable.

Indeed, the pervasive confusion over where to draw the jurisdictional limits of § 404 has been widely recognized. A recent editorial in the *Washington Post* highlighted this confusion and the mounting problems that the circuit split is causing:

> Last year the Supreme Court narrowed the reach of the Clean Water Act, holding that it doesn't apply to "isolated" wetlands because it refers to navigable waters. The result has been confusion, and potential danger to natural habitats. Federal officials in different areas of the country have put the court's ruling into practice differently. States haven't made much progress in filling the gap. Two U.S. courts have reached opposite conclusions about how much connection to navigable water is enough to bring a wetland within the Clean Water Act's reach.

Protecting Wetlands, WASH. POST, Sept. 27, 2002, at A22.

Many district courts also have acknowledged the confusion that now exists over the meaning of *SWANCC* and the compelling need for Supreme Court guidance as to whether § 404 extends to isolated wetlands not immediately adjacent to navigable waters. See, *e.g.*, *Lamplight Equestrian Ctr.*, 2002

WL 360652, at *5 ("Courts interpreting *SWANCC* have reached varying results, the primary rift being whether the Migratory Bird Rule was the decision's only casualty, or whether the holding limited the Corps' jurisdiction even further"); *United States* v. *Interstate General Co.*, 152 F. Supp. 2d 843, 848 (D. Md. 2001) ("[t]he Court is aware that there is a difference of opinion with regards to the application of *SWANCC* as applied to the CWA"), *aff'd*, 2002 WL 1421411 (4th Cir. July 2, 2002).

Whatever the answer to this important question, the prejudice to petitioners and others resulting from this split of authority is plain. If petitioners' Waters had been located in the Fifth or Ninth Circuits, those Waters would today be free from federal control, subject instead to the proper regulation of state and local authorities. But because they happen to be located within the Seventh Circuit, petitioners are precluded from developing their property as they wish, even though the subject Waters are located 19.1 stream miles away from the nearest navigable water, and the filling of those Waters would have no effect upon any navigable water body.

Absent Supreme Court review, this question will undoubtedly continue to plague the courts. Since this Court's decision in *SWANCC*, numerous federal decisions have been issued that attempt to discern its meaning, many of which have come to opposite conclusions. Trip Van Noppen, *Current Developments in Clean Water Act Litigation*, SG101 ALI-ABA 1041, 1043 (2002) (the *SWANCC* decision "has spawned decisions on CWA jurisdictional issues in a dizzying variety of fact situations with conflicting results"). There is no reason to believe that the lower courts can resolve this disagreement without Supreme Court guidance.

C. The Seventh Circuit's Holding Is Inconsistent With This Court's Decision In *SWANCC*.

The Seventh Circuit's holding that federal agencies possess the power to regulate "nonnavigable, isolated wetlands that

have no surface connection to the nearest stream or nearest navigable body of water" cannot be reconciled with this Court's decision in *SWANCC*.

As set forth above, *SWANCC* plainly did more than merely strike down the Migratory Bird Rule. At the very least, *SWANCC* limited § 404 jurisdiction to: (1) navigable-in-fact waters; (2) primary tributaries of navigable-in-fact waters; and (3) wetlands "immediately adjacent" to each. Indeed, the majority opinion suggests an even broader holding, one that limits the jurisdiction of federal regulators to two categories of waters: (1) navigable-in-fact waters and (2) wetlands immediately adjacent thereto. *SWANCC*, 531 U.S. at 168 (Section 404 does not extend "to ponds that are *not* adjacent to open water"); *id.* at 172 ("[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made").

This Court was presented with a petition for certiorari relying on this reading of *SWANCC* shortly after that case was decided. John Rapanos, who had been convicted of illegally filling wetlands that were "at least 20 miles from the nearest navigable waterway,"[4] asked the Court to decide whether, under *SWANCC*, federal regulators have § 404 "jurisdiction over isolated wetlands not adjacent to any navigable or open waters." See *Rapanos* v. *United States*, Petition for Certiorari at i, 7 (No. 00-1428). This Court granted the petition, vacated the judgment below and remanded for further consideration in light of *SWANCC*. See *Rapanos* v. *United States*, 533 U.S. 913 (2001).

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[4] The hydrological connection in *Rapanos* was described as follows: "any water flowing from Mr. Rapanos' property would flow into the Lobodzinski Drain, then into the Hoppler Drain and from there into the Kawkawlin River, ultimately reaching the Saginaw Bay [a navigable body of water], some twenty (20) miles away." *Rapanos* Pet. 8.

Following the remand, the district court vacated the defendant's 1995 criminal conviction, holding "as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property." *United States* v. *Rapanos*, 190 F. Supp. 2d 1011, 1017 (E.D. Mich. 2002).

The district court in *Rapanos* thus applied the "immediately adjacent" test adopted by the Fifth Circuit. And as in *Rapanos*, petitioners' Waters here are beyond the federal regulators' reach under this standard. Petitioners' Waters are clearly non-navigable and isolated, as established by the uncontradicted expert testimony presented below. The nearest non-navigable water body, Salt Creek, is located 1.9 stream miles away from the property, and the nearest *navigable* water, the Des Plaines River at Hoffman Dam, is located 19.1 stream miles away. App., *infra*, 71a-72a. In order for any runoff from the property to reach the Des Plaines River at Hoffman Dam, it must travel into a manhole with an open grate, which connects to a "manmade, underground, concrete storm sewer system" that runs 2000 feet east and then flows into a small ditch that joins non-navigable Salt Creek about 1.5 miles further east. *Id.* at 71a. Salt Creek then joins the Des Plaines River approximately 16.5 stream miles to the Southeast. *Ibid.* At these distances, petitioners' Waters can hardly be described as "immediately adjacent" to or abutting on a navigable water or even a primary tributary to a navigable water.

Petitioners' Waters also lie beyond the limits of federal regulation if one were to apply the "effects" approach adopted by the Ninth Circuit and other courts. Petitioners' Waters have no "significant nexus" with, nor are they — in the words of *Riverside Bayview*—"inseparably bound up" with any navigable waters. *See* 474 U.S. at 133. Indeed, petitioners presented uncontradicted expert testimony that even the filling of *all* of petitioners' Waters—not just the 4.5 acres allegedly filled—"would have no measurable effect on the Des Plaines

River or Salt Creek in terms of wildlife habitat, stormwater retention, flood flow attenuation and water purification." App., *infra*, 74a. In fact, the "Site's drainage is often times hydrologically isolated." *Id.* at 72a.

Given these uncontradicted facts, to extend § 404 to cover the Waters in this case would not only run contrary to the statute, but also would clearly violate the Commerce Clause—raising the same "significant constitutional and federalism questions" that this Court highlighted in *SWANCC*. 531 U.S. at 174; see also *ibid.* ("Regulation of land use [is] a function traditionally performed by local governments") (*quoting Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). Indeed, federal agencies are seeking to regulate the use of waters and private property that have no conceivable connection to any federal interest in commerce or navigation. Congress clearly did not allow regulators to meddle in such intrinsically local issues:

> Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States * * * to plan the development and use * * * of land and water resources * * *."

Ibid. (omissions in original). These concerns lead to the inexorable conclusion that the federal government has no jurisdiction to regulate the sort of private, intrastate and non-navigable waters at issue in this case. After all, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. No such indication appears in this case.

In short, *SWANCC* confirms that federal regulators never had jurisdiction over petitioners' Waters. The Seventh Circuit's holding to the contrary must be reversed.

II. THE SEVENTH CIRCUIT ERRED IN REFUSING TO RESCIND THE CONSENT DECREE AS VOID *AB INITIO* DUE TO THE GOVERNMENT'S LACK OF REGULATORY AUTHORITY.

Petitioners moved to vacate the consent decree in this case on the ground that federal agencies never had authority to regulate petitioners' Waters, that its execution of the consent decree was thus an *ultra vires* act, and that the government should not be allowed to continue regulating petitioners' Waters when it never possessed regulatory authority over them in the first place. The Seventh Circuit affirmed the denial of the motion to vacate, holding that even if the federal government never had regulatory authority over petitioners' Waters, petitioners are nevertheless bound by the Consent Decree because they "expressly agreed that certain waters on [the] property constituted 'waters of the United States,' subject to regulation by the EPA." App., *infra*, 15a. In the Seventh Circuit's view, even if the federal government never had authority to regulate petitioners' Waters, the government nevertheless can continue to regulate them pursuant to petitioners' stipulation to federal regulatory jurisdiction.[5]

The Seventh Circuit's holding clearly conflicts not only with this Court's decisions, but with those of other multiple courts of appeals, which have held that consent decrees and other contracts are subject to rescission where the government

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[5] Citing previous decisions in this case, at least two district courts have bound private parties by their stipulations to EPA jurisdiction. See *United States* v. *Rueth Dev. Co.*, 189 F. Supp. 2d 874, 890 (N.D. Ind. 2002) ("By assenting to settlement in this action, Defendants waived, for example, the right to contest the EPA's regulatory jurisdiction"); *Interstate General*, 152 F. Supp. 2d at 848-849 (barring defendant from challenging federal CWA jurisdiction after pleading guilty to environmental crime); see also *United States* v. *Ownbey Enters., Inc.*, 789 F. Supp. 1145, 1150 (N.D. Ga. 1992) (defendant's "admission as to EPA's jurisdiction acts as an acceptance by [defendant] that all necessary conditions precedent to the issuance of this Order have been fulfilled").

lacked authority to enter into them. Indeed, to hold otherwise would be to allow the federal government to retain the spoils of illegal regulation and to continue its improper intrusion upon the rights of state and local governments to regulate the use of intrastate waters that have no conceivable connection to any navigable waters.

A. Private Citizens Cannot Contractually Expand A Federal Agency's Statutory And Constitutional Authority.

The Consent Decree in this case permits federal agencies to regulate petitioners' Waters on an ongoing basis. Despite a lack of statutory authority, it authorizes the government to gain access to the Royce property, requires petitioners to sell or convey the property only subject to certain restrictive covenants that run with the land, entitles the government to over $1.5 million in penalties currently in escrow and further fines if petitioners violate the decree, empowers the government to enforce the decree and all of its prohibitions, and forbids petitioners from discharging dredged or fill material into the waters without a permit. App., *infra*, 35a, 40a-41a, 48a-49a, 52a-57a.

As demonstrated above, however, petitioners' isolated wetlands were never within the regulatory jurisdiction of the EPA. If that is so, it makes no difference that petitioners stipulated to federal regulatory jurisdiction in the Decree. This Court has clearly held that federal agencies may not act beyond their congressionally delegated authority. "[N]o matter how 'important, conspicuous, and controversial' the issue * * * an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000); see also *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power * * * is limited to the authority delegated by Congress"); *Chrysler Corp.* v. *Brown*, 441 U.S.

281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes").

The constitutional limits on federal power, and the statutory limits on agency authority, are fundamental to the American conception of a federal government of limited powers. Consistent with this principle, courts have long recognized that private citizens may not confer authority upon a government actor that the actor does not otherwise enjoy under law. See, *e.g.*, *Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 526 (1986) ("[T]he parties may [not] agree to take action that conflicts with or violates the statute upon which the complaint was based"); *Williams* v. *Metzler*, 132 F.3d 937, 942, 943 (3d Cir. 1997) ("[T]he parties are attempting to vest consensual jurisdiction in the Secretary to perform a function that Congress has explicitly placed in the district court. * * * If the Secretary's decision serves to block full consideration of the merits in the district court, then the Secretary has done indirectly what is *ultra vires* if done directly"); see also *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990) ("it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction'").

Federal regulators attempt to do here precisely what this Court has forbidden—to expand their regulatory jurisdiction by contract. The fundamental restrictions on federal agency power, however, apply to all forms of regulation, including enforcement through consent decrees. As the Fifth Circuit has noted, "[c]ourts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority. Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court." *League of United Latin Am. Citizens* v. *Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc); see also *Keith* v. *Volpe*, 118 F.3d

1386, 1393 (9th Cir. 1997) ("To the extent the parties to the Consent Decree intended to ban advertising displays next to I-105, they could not agree to terms which would exceed their authority and supplant state law"); *National Revenue Corp.* v. *Violet*, 807 F.2d 285, 288 (1st Cir. 1986) ("For an attorney general to stipulate that an act of the legislature is unconstitutional is a clear confusion of the three branches of government * * * . An attorney general can have no authority to be the binding determiner that legislation is unconstitutional. The agreed judgment was void on its face").

Thus, if the federal government never had statutory or constitutional authority to regulate petitioners' Waters, it was necessarily without authority to enter into any consent decree that regulates wetlands beyond the statutory and constitutional reaches of federal power.

B. This Court's Decisions And Those Of Other Courts Of Appeals Confirm That Consent Decrees Are Void *Ab Initio* And Subject To Rescission Where The Government Had No Authority To Execute Them.

Consent decrees are governed by principles of contract law,[6] and it is black-letter contract law that where a government's execution of a contract constitutes an *ultra vires* act, the contract itself is void *ab initio* and has no legal effect. Indeed, this Court has adopted this prevailing view as federal common law. In *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947), for instance, the Court held that an *ultra vires* contract with a federal agency was void and unenforceable. In

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[6] This Court has held many times that "a consent decree or order is to be construed for enforcement purposes basically as a contract." *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975); see also, *e.g.*, *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971); *Hughes* v. *United States*, 342 U.S. 353, 356 (1952). Consent decrees are governed by contract law because "it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Local Number 93*, 478 U.S. at 522.

that case, the Federal Crop Insurance Corporation—an agency created by Congress as part of the Department of Agriculture—accepted an application for crop insurance. Later that year, drought destroyed the insured crop. The Corporation refused to pay the loss because it learned that the crop was planted on re-seeded land, and federal regulations prohibited the Corporation from issuing insurance policies to crops on such lands. *Id.* at 381-382. Despite the equities of the situation, the Court held that the insurance policy was void *ab initio* because the Corporation lacked authority to issue the policy in the first place. *Id.* at 385; see also *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 671, 681 (1869) (contract between Secretary of War and supply company was null and void because "the secretary was acting wholly beyond the scope of his authority").

This Court has reached the same conclusion with respect to consent decrees in particular. A century ago, for instance, the Court voided an *ultra vires* consent decree between the United States and two defendants in *United States* v. *Beebe*, 180 U.S. 343 (1901). The defendants in that case were sureties on a federal tax collector's bond; when the collector failed to account for public monies that had come into his hands, the United States moved to collect from the defendants. *Id.* at 344-345. The government commenced actions against the defendants seeking over $28,000, but the attorney for the government eventually agreed to a consent judgment—due to the defendants' claimed poverty—by which the government would dismiss the actions in exchange for a $100 payment from each defendant. *Id.* at 344-346.

Four years after the district court approved the consent judgment, the government petitioned to void it on the ground that the prosecutor had lacked authority to enter into it; federal regulations at the time provided that "no district attorney shall agree to take a judgment or decree for a less amount than is claimed by the United States, without express instructions from

the Solicitor of the Treasury." *Beebe*, 180 U.S. at 351. The Court held that "[a] judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests," and "the judgment will be vacated on that ground." *Id.* at 352. The Court ordered the parties returned to the status quo ante—after a new trial or settlement, the defendants' $100 payments would be either returned to them or credited against the judgment. *Id.* at 354-355.[7]

Lower federal courts consistently have applied this rule. In *United States* v. *Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986), for example, the court held that a contract by the Treasury Department to acquire computer equipment exceeded the agency's authority. Such an *ultra vires* contract, the court held, was void *ab initio* and was therefore rescinded. *Id.* at 393. The court stated that "[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect. * * * The courts are bound to strike down illegal contracts." *Id.* at 392-393; see also *Schism* v. *United States*, __ F.3d __, 2002 WL 31549178, at *13-*23 (Fed. Cir. Nov. 18, 2002) (en banc) (holding that military lacked authority to promise lifetime healthcare to certain servicemen); *Orange* v. *District of Columbia*, 59 F.3d 1267, 1271 (D.C. Cir. 1995) (holding that university's employment contracts with plaintiff-professors

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[7] The Court took a similar path in *Kelley* v. *Town of Milan*, 127 U.S. 139 (1888). Investors there sued a municipality to collect on railroad bonds issued by the local government. Under state law, the municipality lacked the authority to issue the bonds, *id.* at 150, and it attempted to avoid payment on that basis. To rebut that assertion, the investors pointed to a consent decree between the municipality and the relevant railroad company that declared the bonds valid; the municipality argued that, as with the bonds themselves, its agents lacked authority to enter the consent decree. *Id.* at 158-160. The Court held that "[t]he act of the mayor, in signing that [consent] agreement, could give no validity to the bonds, if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid. The mayor had no such authority." *Id.* at 159.

were "invalid as written" and therefore void and unenforceable because the contracts were not approved by the university's Board of Trustees, as required by D.C. law); *Total Med. Mgmt., Inc.* v. *United States*, 104 F.3d 1314, 1320-1321 (Fed. Cir. 1997) ("Neither the Secretary of Defense nor any of his designated representatives had the authority to obligate CHAMPUS beyond these base rates set by regulation"); *Augusta Aviation, Inc.* v. *United States*, 671 F.2d 445, 448-449 (11th Cir. 1982) (holding that contract between V.A. and school was "void for lack of authorization" because "[t]he Administrator does not have the power to grant a veteran any more money than the amount permitted by the ratio in the statute").[8]

In this case, if this Court were to hold that federal regulators never had authority over petitioners' Waters, it follows that the Consent Decree must be rescinded as an *ultra vires* contract, notwithstanding petitioners' stipulation to EPA jurisdiction. To hold otherwise would permit the federal government to expand its jurisdiction by contract beyond the limits specified by Congress and the Constitution, thus improperly altering the very balance between state and federal power that this Court sought to protect in *SWANCC*.

If, as petitioners contend, the government lacked jurisdiction over their Waters, the Consent Decree must be declared void *ab initio*, and the appropriate remedy is rescission, putting the parties back in the positions they held before the government's illegal exercise of regulatory authority. See *REW Enters.* v. *Premier Bank, N.A.*, 49 F.3d 163, 171 (5th Cir. 1995) (voiding federal land bank's *ultra vires* acceptance of letter of credit and returning all parties to status quo ante:

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[8] See also 12 WILLISTON ON CONTRACTS § 35:63 (4th ed. 1999) (summarizing general rule that *ultra vires* contracts by governments are void); 2 FARNSWORTH ON CONTRACTS § 5.1 (2d ed. 1998) (summarizing general rule that illegal contracts are void *ab initio*).

"Because an *ultra vires* contract is null and void, the remedy for rescission of that contract is to put the parties in the position they would have occupied had the unlawful agreement not been made"); *Tuxedo Cheverly Volunteer Fire Co.* v. *Prince George's County*, 385 A.2d 819 (Md. Ct. Spec. App. 1978) (holding that municipal corporation's *ultra vires* contract was void *ab initio* and therefore required returning parties to status quo ante); *Bennett* v. *Hedglin*, 995 P.2d 668 (Alaska 2000) (rescission is proper remedy for contracts that are void *ab initio*); *Bergstrom* v. *Estate of DeVoe*, 854 P.2d 860 (Nev. 1993) (same); *Klopp* v. *Keystone Ins. Cos.*, 595 A.2d 1 (Pa. 1991) (same).

In short, the Seventh Circuit's holding that petitioners are bound by their consent to EPA regulatory jurisdiction contravenes this Court's established jurisprudence and the holdings of other courts of appeals, and must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL., *Defendants-Appellants*.

No. 01-2746.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5354—William T. Hart, *Judge*.

Argued May 14, 2002—Decided Sept. 9, 2002.

Before COFFEY, MANION, and EVANS, *Circuit Judges*.

MANION, *Circuit Judge*.

In 1992, the EPA sued Robert Krilich and several corporations he controlled, alleging violations of the Clean Water Act. The parties entered into a Consent Decree resolving the case. However, after the Supreme Court held that the Army Corps of Engineers exceeded its authority in extending the definition of "navigable waters" under the Clean Water Act to include intrastate waters used by migratory birds, Krilich moved the district court to vacate the Consent Decree. The district court refused to do so. Krilich appeals, and we affirm.

I. Factual and Legal Background

On August 7, 1992, the United States Environmental Protection Agency ("EPA") filed a civil complaint against the defendants,[1] alleging that they violated the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"). The government alleged that Krilich violated Section 301 of the CWA by discharging fill material without a permit into wetlands on two Illinois sites that he was developing: the Royce Renaissance site in Oakbrook, Illinois and the Sullivan Lake site in Lakemoor, Illinois. Section 301(a) prohibits the "discharge of any pollutant," except as otherwise authorized by the CWA. 33 U.S.C. § 1311(a). Section 404 of the CWA authorizes the Secretary to issue a permit approving "the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7). "Waters of the United States" are further defined by regulations promulgated under the CWA. 33 C.F.R. § 323.2(a). *See generally* 33 C.F.R. Pt. 328. Section 328.3(a)(3) further defines "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

While the suit was pending and the parties were negotiating, this court issued a decision holding that the EPA's construction of "waters of the United States" as including intrastate, nonadjacent or "isolated" wetlands under 40 C.F.R.

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[1] The government filed suit against Robert Krilich individually and several corporations which he controlled. Throughout this opinion, we simply refer to "Krilich" or the "defendants".

§ 230.3(s)(3)[2] exceeded its authority under the CWA. *See Hoffman Homes, Inc.* v. *Adm'r, United States Envtl. Prot. Agency*, 961 F.2d 1310, 1316 (7th Cir. 1992) ("*Hoffman Homes I*"), *vacated by* 975 F.2d 1554 (7th Cir. 1992). In *Hoffman Homes I*, this court further held that, even if the regulation was reasonable under the CWA, Congress lacked authority under the Commerce Clause to regulate such waters based simply on the actual or potential use of such waters by migratory birds.[3] *Id.* at 1321. Following *Hoffman Homes I*, Krilich and the EPA drafted a Consent Decree to settle their dispute. The Consent Decree acknowledged the potential impact of the *Hoffman Homes I* decision by incorporating the following provisions:

IV. DEFINITIONS

10. Except as specifically modified herein, the terms "waters of the United States"; "wetlands"; "dredged material"; "fill material"; "discharge of dredged material"; and "discharge of fill material" shall have the meanings assigned them at 40 C.F.R. § 230.3 or 33 C.F.R. § 323.2. "EPA" means the United States Environmental Protection Agency, and "Corps" means the United States Army Corps of Engineers.

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[2] 40 C.F.R. § 230.3(s)(3), the EPA regulation that defines "waters of the United States," is identical to the Army Corps of Engineers regulation, 33 C.F.R. § 328.3(a)(3), also defining the phrase. As noted, *infra*, both are referenced in Paragraph 10 of the Consent Decree.

[3] The Migratory Bird Rule was intended to clarify the scope of 33 C.F.R. 328.3(a)(3), and provided that "waters of the United States . . . also include the following waters: a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b. Which are or would be used as habitat by other migratory birds which cross state lines . . . ." 51 Fed. Reg. 41217 (1986).

V. WATERS OF THE UNITED STATES

17. For purposes of this Consent Decree, the parties shall treat wetland and open water areas depicted on Exhibit 1, together with the new wetland and open water area created pursuant to Part VII (injunctive relief) and depicted on Exhibit 2, as waters of the United States located on the Royce Renaissance Property.

* * *

20A. The Defendants shall continue to treat wetland and open water areas depicted on Exhibit 1 as waters of the United States until the mandate issues in *Hoffman Homes, Inc.* v. *EPA*, No. 90-3810 (7th Cir. April 20, 1992) and until proceedings related to any appeal, petition for certiorari, or remand are completed. Following completion of these proceedings, unless pertinent portions of the Seventh Circuit's April 20, 1992 decision are reversed, Exhibit 1 areas W2A, W2B, W3, W5B, and W9 shall be excluded from the obligations imposed in Paragraph 17.

Thus, the parties expressly excluded some waters on the defendant's property and agreed to treat the rest of the waters as "waters of the United States."

Before the parties approved the final Consent Decree, *Hoffman Homes I* was vacated "on September 4, 1992, before the birds had reason to migrate south." *United States* v. *Krilich*, 209 F.3d 968, 970 (7th Cir. 2000) ("*Krilich IV*"). Thereafter, the parties signed the Consent Decree, incorporating the *Hoffman Homes I* language, notwithstanding the fact that it had been vacated. The Consent Decree required the defendants to undertake certain remediation and mitigation activities and to pay fines for filling wetlands. On October 29, 1992, the district

court entered final judgment under the Consent Decree, and under the terms of the Decree, retained jurisdiction.[4]

Nine months after the Consent Decree was agreed upon and final judgment entered, this court issued *Hoffman Homes II*, wherein we held that the EPA lacked jurisdiction over the wetlands at issue because the government had failed to present substantial evidence (under the "Migratory Bird Rule") that migratory birds actually used the wetlands as a habitat. *See Hoffman Homes, Inc.* v. *Adm'r, United States Envt'l Prot. Agency*, 999 F.2d 256, 261-62 (7th Cir. 1993) ("*Hoffman Homes II*"). Unlike *Hoffman Homes I*, we did not reach the question of whether the Migratory Bird Rule was within the limits of Congress' power under the Commerce Clause.

On September 27, 1995, the government moved to enforce the Consent Decree, alleging that Krilich had failed to construct the replacement wetland by the date specified in the Consent Decree and that Krilich had violated the Decree by discharging fill material into an area known as W9, which the government contended was a "water of the United States." The district court agreed with the government regarding Krilich's failure to perform remediation and imposed civil penalties of $1,307,500. *See United States* v. *Krilich*, 948 F. Supp. 719, 728 (N.D. Ill. 1996) ("*Krilich I*"). With respect to the allegation that Krilich had improperly discharged fill material into W9, the district court concluded that "pertinent portions" of *Hoffman Homes I* had not been "reversed" by *Hoffman Homes II* within the meaning of Paragraph 20A of the Consent Decree. *Id.* at 725. Therefore, the district court concluded that, under the Decree, W9 was not a "water of the United States" and accordingly denied the government's motion to impose a penalty for filling

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[4] Paragraph 2 of the Consent Decree provides: "The Court shall retain jurisdiction in order to enable any party to apply to the Court at any time for such further relief as may be necessary to interpret, enforce, or modify this Decree."

that area. Krilich appealed the district court's decision to impose penalties for his failure to perform remediation, *id.*, and this court affirmed, but remanded the case to the district court to correct an error made in calculating that penalty. *See United States* v. *Krilich*, 126 F.3d 1035, 1037-38 (7th Cir. 1997) ("*Krilich II*"). On remand, in November 1998, Krilich moved pursuant to Rule 60(b)(4) to vacate the district court's original judgment entering the Consent Decree, arguing that the court lacked subject matter jurisdiction over the EPA's complaint. Specifically, Krilich argued that

> the land he allegedly filled was an "isolated intrastate wetland" which was beyond the federal government's commerce power to regulate. Because Congress lacked authority to regulate his property, Krilich contend[ed] that the district court lacked subject matter jurisdiction over the EPA's complaint. And even though he agreed to the terms of the consent decree, which included a provision that the wetlands filled were "waters of the United States," Krilich [argued] that this does not change the result because you can never consent to subject matter jurisdiction, and lack of jurisdiction can be raised at any time.

Krilich IV, 209 F.3d at 971. The district court rejected Krilich's argument, *United States* v. *Krilich*, 1999 WL 182333 (N.D. Ill. March 25, 1999) ("*Krilich III*"), and on appeal this court held that "the district court had subject matter jurisdiction over the EPA's case against Krilich because the suit civilly charged a violation of a federal statute which is within the federal courts' federal question jurisdiction." *Krilich IV*, 209 F.3d at 973. Additionally, we held that Krilich's argument failed "because he entered into a consent decree stipulating that the waters involved were 'waters of the United States.'" *Id.* Finally, we stated that, because the district court had subject matter jurisdiction based on the terms of the Consent Decree, we did not need to reach the question of whether the regulation of

isolated intrastate wetlands exceeded Congress' power under the Commerce Clause. *Id.* at 973, n. 5.

Last year, nine months after we issued *Krilich IV*, the Supreme Court rendered a decision holding that 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, "exceeds the authority granted to [the Army Corps of Engineers] under § 404(a) of the CWA." *Solid Waste Agency of Northern Cook Co.* v. *United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). In interpreting Section 404(a), the Court concluded that nothing in the text of the CWA indicated that Congress intended to allow the jurisdiction of the Corps of Engineers to extend to "ponds that are *not* adjacent to open water." *Id.* at 168. The Supreme Court did not reach the question of whether Congress could exercise such authority consistent with its power to legislate under the Commerce Clause. *Id.* at 162, 174.

After *SWANCC* was issued by the Supreme Court, Krilich brought the present motion in federal district court, arguing that, under *SWANCC*, the waters affected by the Consent Decree are not subject to the EPA's authority under the CWA. Therefore, Krilich reasoned, the execution and enforcement of the Consent Decree by the EPA is an *ultra vires* act and the Consent Decree was void *ab initio*. Krilich identified three bases for the district court's authority to vacate or modify the Decree: the express reservation-of-jurisdiction clause contained in Paragraph 2 of the Consent Decree, the court's inherent power to modify its judgments, and Rule 60(b)(5) in light of a change in the law, namely, the *SWANCC* decision.[5]

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[5] Even though Krilich brought the action under the Consent Decree's express reservation-of-jurisdiction clause and under the court's inherent authority, and only alternatively under Rule 60(b)(5), the court treated his motion as one under Rule 60(b). *United States* v. *Krilich*, 152 F. Supp. 2d 983, 990 (N.D. Ill. 2001) ("*Krilich V*"). The district court noted that its inherent authority to modify its judgments was not more expansive than the authority provided in Rule 60(b). *Id.* Additionally, the district court concluded that its

In considering Krilich's motion, the district court assumed that all of the waters at issue were nonnavigable, isolated wetlands that had no surface connection to the nearest stream or nearest navigable body of water.[6] *Krilich V*, 152 F. Supp. 2d at 989. Even so, the district court denied the defendants' motion, holding that even if the Consent Decree were *ultra vires*, it did not have the authority to vacate or modify it. The court reached this conclusion for several reasons,[7] but only one is challenged on appeal: whether the Decree should be modified under Rule 60(b)(5) due to a change in the law.[8] The

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powers under Paragraph 2 were not broader than its authority under Rule 60(b). *Id.* Krilich abandons his reliance upon the court's inherent authority on appeal, but as explained below, continues to argue that both Rule 60(b)(5) and Paragraph 2 of the Consent Decree serve as independent bases for modification.

[6] The defendants submitted an expert report of Gary C. Schaefer, P.E. in support of their motion, contending that all the waters at issue under the Consent Decree were isolated.

[7] The court analyzed Krilich's motion under Rule 60(b)(4), which provides for relief if the judgment is void, and determined that the fact that a party to a consent judgment lacked authority to consent does not void the judgment itself. *Krilich V*, 152 F. Supp. 2d at 991. Next, the court analyzed Krilich's motion under Rule 60(b)(1) for mistake of law and rejected this ground as untimely. *Id.* at 992. *See* Fed.R.Civ.P. 60(b) (Rule 60(b)(1) motion must be brought within one year of entry of judgment). Third, the district court analyzed Krilich's motion under the catch-all provision of Rule 60(b)(6) and concluded that because Krilich had stipulated that the property in question constituted "waters of the United States" it was bound by that stipulation. 152 F. Supp. 2d at 992. *Cf. Krilich IV*, 209 F.3d at 972 (Krilich could not "assail the district court's subject matter jurisdiction because he entered into a consent decree in which he agreed that the waters involved were 'waters of the United States.'"). Krilich does not appeal these determinations and, therefore, we need not review them.

[8] Rule 60(b)(5) provides, in part, that a judgment may be modified if "it is no longer equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b)(5).

district court first noted that in *Hoffman Homes I* this court held that "isolated wetlands" were not subject to CWA regulation. *Id.* at 994. The court then noted that the parties took this decision into account by referencing it in Paragraph 20A of the Consent Decree and expressly excluding specified wetlands that Krilich contended were isolated. *Id.* The court also noted the Supreme Court's decision in *SWANCC* holding that the Migratory Bird Rule exceeded the agencies' authority under the CWA. *Id.* The district court determined that the Supreme Court's decision in *SWANCC* was no more narrow than *Hoffman Homes I*, and since Paragraph 20A of the Consent Decree was crafted with that decision in mind, the district court concluded that the Decree was drafted in light of controlling precedent that was no less favorable to Krilich than *SWANCC*. *Id.* at 994-95. The court also noted that "[e]quity does not require that the Decree be reopened so that defendants may now litigate whether the wetlands on the property are actually isolated. Defendants chose not to do so more than eight years ago and the legal framework has not changed in a manner that would justify doing it today." *Id.* at 995.

Krilich appeals, claiming that the district court should have vacated or modified the Consent Decree under either Rule 60(b)(5) or the Consent Decree's reservation-of-jurisdiction clause in Paragraph 2.

II. Analysis

A. Standard of Review

We review a denial of Rule 60(b)(5) relief for an abuse of discretion. *See Protectoseal Co.* v. *Barancik*, 23 F.3d 1184, 1186 (7th Cir. 1994). We review a district court's interpretation of a consent decree *de novo*. *See Alliance to End Repression* v. *City of Chicago*, 119 F.3d 472, 474 (7th Cir. 1997).

Although the defendants submitted a professional engineer's expert report attempting to establish that all the wetlands subject to the Consent Decree are isolated, the district court did

not conduct a hearing on that issue, nor did it reach a conclusion. Rather, it assumed that all waters at issue were nonnavigable, isolated wetlands with no surface connection to the nearest stream or nearest navigable body of water. *Krilich V*, 152 F. Supp. 2d at 989. We proceed under the same assumption because, as discussed below, even assuming that the wetlands were isolated, Krilich is nonetheless bound by the Consent Decree.

B. Grounds for Relief under Rule 60(b)(5)

A consent decree, while contractual in nature, is enforceable as "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo* v. *Inmates of Suffolk Co. Jail*, 502 U.S. 367, 378 (1992). Accordingly, parties wishing to modify or vacate a consent decree may do so by resorting to Rule 60(b). In moving to modify or vacate the Consent Decree, Krilich relies upon the third clause of Section (b)(5) of Rule 60, which provides that a judgment may be modified if "it is no longer equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b)(5). In interpreting this clause of Rule 60(b)(5), the Supreme Court has set forth a two-part test to determine whether modification is warranted. *See Rufo*, 502 U.S. at 383. Under that test, a party seeking to modify a Consent Decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* A party may meet the initial burden of establishing a significant change in circumstances "by showing a significant change either in factual conditions or in law." *Id.* at 384. Krilich does not contend that there has been a change in factual conditions, only that the Supreme Court's decision in *SWANCC* is a significant change in the law. If the moving party meets this initial burden, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 383.

In *Rufo*, the Supreme Court identified instances in which a significant change in law may have occurred. For example, the

Court stated, a "consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id.* at 388. *See also Agostini* v. *Felton*, 521 U.S. 203, 215 (1997) (granting a Rule 60(b)(5) modification of a permanent injunction based on intervening law). The *Rufo* Court also noted that "[w]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Id.* at 390.

Krilich argues that Rule 60(b)(5) provides a basis to modify the Decree, and that the district court abused its discretion by denying him relief thereunder. Specifically, he contends that *SWANCC* represents a significant change in the law under the third clause of Rule 60(b)(5), thereby requiring the Consent Decree to be vacated, or at a minimum, modified prospectively. He argues that *SWANCC* establishes that the government never had authority to regulate the waters at issue and that "it is difficult to imagine a more relevant change in the law." Accordingly, he reasons that *SWANCC* makes clear that the entry and continued enforcement of the Consent Decree are *ultra vires* acts by the EPA, requiring the Decree to be vacated. *See, e.g., Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947) (where agency granted crop insurance, and later found out that crop was planted on re-seeded land for which agency could not issue insurance policies, court found insurance policy void *ab initio*). *See also Dunn* v. *Carey*, 808 F.2d 555, 559-60 (7th Cir. 1986) ("Because a consent decree's force comes from agreement rather than positive law, the decree depends on the parties' authority to give assent.").

Initially, Krilich argues that the district court improperly applied the *Rufo* test by reasoning that the parties were not operating under a *misunderstanding* of law and therefore that Krilich was not entitled to vacate the Consent Decree. He argues that the district court should instead have asked whether *SWANCC changed the law*. However, the district court did not improperly apply the *Rufo* test. The district court concluded that *SWANCC* was not a significant change in the law by reasoning that the Consent Decree was drafted in light of a law (as enunciated in *Hoffman Homes I*) that was as favorable to Krilich as was the later *SWANCC* decision. In essence, the district court was determining whether "the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388. To the extent that the district court did question whether the parties misunderstood the law, *Rufo* specifically identifies the parties' misunderstanding of law, as later clarified by another decision, as a circumstance where modification might be warranted. *Rufo*, 502 U.S. at 390.

Krilich also contends that the district court erred in relying upon the fact that the Consent Decree was drafted in light of *Hoffman Homes I*, because it had been vacated and was no longer the governing law of this circuit by the time the Decree was entered. Therefore, he claims that we should analyze whether *SWANCC* represents a significant change in the law from the law pre-*Hoffman Homes I*, wherein we had merely held "that Congress intended the Clean Water Act to regulate all the 'navigable waters' within its constitutional reach under the Commerce Clause." *See Hoffman Homes I*, 961 F.2d at 1316-17 (citation omitted). However, this argument ignores the fact that notwithstanding the vacation of *Hoffman Homes I*, the parties agreed to incorporate its interpretation of the law into the Consent Decree and Krilich benefitted from that decision. Under these circumstances, it would not be equitable to compare a change in the law pre-*Hoffman Homes I* to *SWANCC*. Rather, under Rule 60(b)(5), we must determine

whether the law has changed significantly enough such that it would be equitable to modify *this* Consent Decree that itself incorporated the legal standards set out in *Hoffman Homes I*.

That brings us to the heart of Krilich's argument: that *SWANCC* eliminated the EPA's authority to regulate the wetlands at issue because they are nonnavigable, isolated, intrastate waters. Unfortunately for him, he already agreed that the waters were "waters of the United States." To get around his stipulation, he contends that the holding in *Hoffman Homes I* is narrower than *SWANCC*, and therefore *SWANCC* does constitute a significant change in law under *Rufo* justifying modification of the Decree. He argues that, in *SWANCC*, the Supreme Court removed from the Corps' regulatory authority all waters that are not adjacent to bodies of open water, *SWANCC*, 531 U.S. at 168, whereas in *Hoffman Homes I*, the court defined isolated wetlands as those that "have no hydrological connection to any body of water." 961 F.2d at 1314. But the precise holding of *SWANCC* was not so broad. While reaffirming its prior holding that Section 404 encompassed non-navigable wetlands adjacent to navigable waters, 531 U.S. at 167-68 (citing *United States* v. *Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985)), the Court explicitly declined to further determine the exact meaning of "navigable waters." *SWANCC*, 531 U.S. at 171. And, it declined to reach any constitutional question. *Id.* at 174. Rather, in *SWANCC*, the Supreme Court merely held that the definition of "waters of the United States" under 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, "exceeds the authority granted to [the Corps] under § 404(a) of the CWA." *Id.* This limited holding does not represent a significant change in the law such that it would be equitable to modify or vacate the Consent Decree.

Moreover, even if *SWANCC* is a significant change in the law from *Hoffman Homes I*—it is not a significant change that is relevant to this Consent Decree. There is nothing in the Consent Decree establishing that the Migratory Bird Rule was

the sole basis for the EPA's assertion of authority over Krilich's property, and therefore *SWANCC* is not a relevant change in the law such that this Consent Decree should be modified. The defendants' own "Motion to Bar Enforcement of Penalty," filed with the district court in 1998 on remand to the district court from our decision in *Krilich II*, acknowledged that "Paragraph 1 of the Consent Decree recites that jurisdiction is based upon the Clean Water Act and other statutes. Paragraph 10 adopts the regulatory definition of wetlands. The Consent Decree does not rely upon the wetlands as a migratory bird habitat as a basis for Commerce Clause jurisdiction." Instead, as the defendants argued in that motion, the government merely relied "upon its authority to define wetlands under the regulations." As the district court noted when the defendants first attempted to challenge subject matter jurisdiction, "there is nothing in the Decree...that makes it apparent that the mitigation plan may have been based solely on the filling of isolated wetlands. Neither was there any information indicating that those wetlands' only possible connection to interstate commerce was their occasional use by migratory birds." *Krilich III*, 1999 WL 182333 at * 2. Thus, *SWANCC* has no appreciable impact on *this* Consent Decree.

As the Consent Decree demonstrates, the parties were already operating on the premise that the Migratory Bird Rule did not authorize the EPA to regulate otherwise isolated wetlands, as that was our conclusion in *Hoffman Homes I*, which the parties expressly incorporated into Paragraph 20A of their agreement. In fact, Paragraph 20A carved out certain wetlands as beyond the EPA's authority and exempted them from the reach of the Consent Decree's requirements. But the parties also agreed that the EPA had authority to regulate Krilich's other wetlands. *SWANCC* in no way altered the other regulations interpreting "waters of the United States."

If a party believes that the waters at issue on his own property are not properly subject to the EPA's authority,

whether under the rationale of *Hoffman Homes I*, *SWANCC* or under some other theory, he should not stipulate otherwise. But that is exactly what Krilich did, to his continued dismay. He expressly agreed that certain waters on his property constituted "waters of the United States," subject to regulation by the EPA. Like most parties that enter into a settlement or plea agreement, he presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation. Accordingly, we conclude that *SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree. Nor does *SWANCC* establish that the EPA's entry into and continued enforcement of the Consent Decree are *ultra vires* acts. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in... litigation." *Rufo*, 502 U.S. at 389.[9]

C. Grounds for Relief under Reservation-of-Jurisdiction Clause

Krilich also argues that the district court had authority to vacate or modify the Decree under Paragraph 2, its reservation-of-jurisdiction clause. As previously noted, the reservation clause expressly provided: "The Court shall retain jurisdiction in order to enable any party to apply to the Court at any time for such further relief as may be necessary to interpret, enforce, or modify this Decree." In analyzing Krilich's argument, the district court concluded that it could not interpret this clause outside the bounds of Rule 60(b). *Krilich V*, 152 F. Supp. 2d at 990. Krilich argues that such an interpretation

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[9] Because we conclude that Krilich did not meet his burden of establishing a change in law warranting modification of the Consent Decree, we need not reach the question whether the proposed modification is suitably tailored to the changed circumstance. *Rufo*, 502 U.S. at 383.

makes the clause meaningless. We note, however, that while relying on the reservation-of-jurisdiction clause as an additional basis for modifying the Consent Decree, Krilich does not identify any standard or test broader than the Supreme Court's test in *Rufo* that would result in a different outcome. We need not decide, however, whether this reservation-of-jurisdiction clause provided the district court with authority beyond Rule 60(b) for vacating the Consent Decree because the reasons Krilich presented for vacating the Consent Decree are misplaced. As discussed above, the Supreme Court's decision in *SWANCC* was not more favorable to Krilich than *Hoffman Homes I*, which was the basis for the Consent Decree. Nor does *SWANCC* establish that the Government exceeded its authority in entering into the Consent Decree. Therefore, whether Krilich's motion was considered under Rule 60(b)(5) or under the reservation-of-jurisdiction clause is immaterial because his claim fails in either case.

III. Conclusion

Krilich voluntarily entered into the Consent Decree with the government, agreeing to resolve their dispute without recourse to further litigation. At that time, the parties were operating under the *Hoffman Homes I* view of the law. The Supreme Court's later decision in *SWANCC* did not alter the parties' reliance on *Hoffman Homes I* that the EPA could not regulate isolated intrastate wetlands. Therefore, the subsequent release of the *SWANCC* decision does not justify vacating the Consent Decree. The *SWANCC* decision does not establish that the Government exceeded its authority in entering into the Consent Decree, so Krilich's claim that the Decree was void *ab initio* fails as well. For these and the foregoing reasons, we AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ROBERT R. KRILICH, ET AL., *Defendants*.

No. 92 C 5354.

June 21, 2001

HART, *District Judge*.

MEMORANDUM OPINION AND ORDER

In 1992, the parties to this case entered into a consent decree regarding Clean Water Act ("CWA") violations involving wetlands in an area being developed by defendants.[1] Following consideration by the court, the proposed decree, as modified, was entered on October 29, 1992 (the "Decree"). The United States subsequently contended that defendants had violated certain provisions of the Decree concerning the Royce Renaissance Property (the "Royce Property").[2] The issue was

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[1] For present purposes, it is unnecessary to make any distinction among the defendants.

[2] The present dispute, as well as the prior disputes that resulted in court rulings, all concern the Royce Property. The existing dispute does not directly concern the Sullivan Lake Property that was also a subject of the Decree.

presented on stipulated and asserted facts and briefed by the parties. It was held that none of the facts claimed to be in dispute were material and a ruling was issued on the basis of the documents that had been presented. Defendants were held to have violated deadlines for a mitigation plan that were contained in the Decree and therefore were subject to a substantial penalty under the terms of the Decree. *See United States* v. *Krilich*, 948 F. Supp. 719 (N.D. Ill. 1996) ("*Krilich I*"). In an opinion dated October 15, 1997, this holding was upheld on appeal, except that the government conceded that there had been a miscalculation of the penalty. *See United States* v. *Krilich*, 126 F.3d 1035 (7th Cir. 1997) ("*Krilich II*"). On December 15, 1997, a modified judgment in the amount of $1,257,500 was entered on the docket.

In November 1998, defendants moved to bar enforcement of the penalty. That motion was construed as being pursuant to Fed.R.Civ.P. 60(b). *See United States* v. *Krilich*, 1999 WL 182333 *1 (N.D. Ill. March 25, 1999) ("*Krilich III*"). The primary argument raised by defendants was that this court lacked jurisdiction to enforce the mitigation plan deadlines. Defendants contended that subject matter jurisdiction was lacking because the Royce Property wetlands that allegedly were improperly filled were not "navigable waters"[3] covered by the CWA nor did they have a sufficient connection with interstate commerce to invoke federal jurisdiction. It was assumed that these issues went to the court's subject matter jurisdiction, but Rule 60(b)(4) relief was denied on the ground that the judgment was not void for lack of subject matter

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[3] The CWA regulates the discharge of dredged or fill material into "navigable waters." 33 U.S.C. § 1344(a). The CWA defines navigable waters as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The Army Corps of Engineers and the Environmental Protection Agency, both of which enforce the CWA, have promulgated regulations defining waters of the United States. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

jurisdiction because, even if jurisdictional, a colorable basis existed for finding the wetlands to be navigable waters and within the federal government's interstate commerce powers. *Id.* at *2. Defendants also contended that the penalty should not be enforced because the Decree should be modified in light of a more recent precedent from another circuit supporting that the filled lands did not fall within the purview of the CWA. The merits of this Rule 60(b)(5) contention were not addressed because defendants only sought retrospective relief (vacating the prior monetary judgment), whereas modifying the Decree in 1999 could only affect possible prospective relief. *Id.* at *3.

Defendants appealed *Krilich III*, raising only the Rule 60(b)(4) contentions discussed above. The Seventh Circuit held that the questions of whether the wetlands at issue were navigable waters or had a sufficient nexus to interstate commerce did not go to the court's subject matter jurisdiction. *United States* v. *Krilich*, 209 F.3d 968, 971-72 (7th Cir. 2000) ("*Krilich IV*"). The court further stated: "Moreover, just as a guilty plea (in which the criminal defendant admits—at least implicitly—the connection between his conduct and interstate commerce) forecloses an appellate attack on subject matter jurisdiction, [defendants] cannot now assail the district court's subject matter jurisdiction because [they] entered into a consent decree in which [they] agreed that the waters involved were 'waters of the United States.'" *Id.* at 972. The Seventh Circuit concluded: "In sum, the district court had subject matter jurisdiction over the EPA's case against [defendants] because the suit civilly charged a violation of a federal statute which is within the federal courts' federal question jurisdiction. And [defendants'] attempt to now assail the court's subject matter jurisdiction fails because [they] entered into a consent decree stipulating that the waters involved were 'waters of the United States,' and that is merely an element of the offense and not the basis for federal subject matter jurisdiction." *Id.* at 973. On November 13, 2000, the Supreme Court denied *certiorari*. *Krilich* v. *United States*, 121 S. Ct. 482 (2000).

On January 9, 2001, the Supreme Court issued *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("*SWANCC*"). In that case, the Supreme Court held that the Army Corps' "Migratory Bird Rule" was unenforceable because it exceeded the authority granted to the Corps under the CWA. *Id.* at 684.[4] Under the Migratory Bird Rule, waters of the United States were defined as including isolated wetlands which are or could be used by migratory birds or endangered species. *See id.* at 678. *SWANCC* holds that the CWA definition of navigable waters/waters of the United States does not extend to the full limits of Congress's powers under the Commerce Clause. *Id.* at 683-84. *SWANCC* does not reach the question of whether, on a basis other than being visited by migratory birds, isolated wetlands may fall under the definition of navigable waters/waters of the United States. *United States* v. *Interstate General Co.*, 152 F. Supp. 2d 843 (D. Md. 2001). It makes clear that it is still the rule that a nonnavigable (in the traditional sense) wetland directly adjacent to a navigable body of water falls within the purview of the CWA, *SWANCC*, 121 S. Ct. at 682-83 (citing *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)), and that an isolated wetland being visited by migratory birds is not enough to bring the wetland within the purview of the CWA. *SWANCC* does not clarify at what points between those two extremes a nonnavigable body of water falls within the CWA definition of navigable waters. *SWANCC* does indicate, though, that wetlands likely need to have a substantial connection to interstate commerce or a connection to navigable waters (in the traditional sense) in order to be waters of the United States that fall within the CWA term navigable waters. *See id.* at 682-83.[5]

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[4] The majority of circuits, including the Seventh Circuit in *SWANCC*, had held otherwise.

[5] No final or proposed regulation has been found which revises the regulatory definitions in light of *SWANCC*. Possible revisions, however, apparently are presently being considered. *See* Further Revisions to the

In February 2001, defendants brought their present motion arguing that the Decree, at least as regards the Royce Property, should be vacated in light of *SWANCC*, which defendants contend makes clear that none of the waters on the Royce Property were navigable waters subject to regulation under the CWA. They contend that, because the waters do not fall within the purview of the CWA, the United States had no authority to regulate the waters and thus no authority to enter into a consent decree, making the Decree an *ultra vires* act. According to defendants, under this theory, the Decree is void *ab initio* and should be rescinded, which would include refunding the penalties already paid and compensating defendants for the expense of the required Royce Property mitigation work. Defendants contend the Decree may be vacated or modified either under the express reservation-of-jurisdiction clause of the Decree or pursuant to the court's inherent powers to modify its judgments. Alternatively, defendants contend that, pursuant to Rule 60(b)(5), the Decree should be modified in light of the change of law. Defendants contend that such a modification would have a prospective effect because its use of the property continues to be affected by the Decree and because the payment for the penalties is presently being held by the court and has not yet been turned over to the government.[6]

At the time defendants presented their motion, the court advised the parties that there were certain issues they should make sure to address. The government was advised that it

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Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4550, 4569 (Jan. 17, 2001).

[6] Under the terms of the Decree, it was to "terminate on August 31, 1998 if all of the on-site and off-site mitigation and enhancement projects meet the final performance standards set forth in the pertinent exhibits for those projects. If the final performance standards are not met on that date, then this Decree will continue in effect until the standards are met." Decree ¶ 86. Apparently, the standards have not yet been met, at least as regards the Royce Property.

would not be required to provide evidentiary proof along with its answer to the motion, but it was expected that the government would at least outline its factual basis for contending the waters on the property still fall within the purview of the CWA, even in light of *SWANCC*. The government apparently misunderstood. The government contends that, even in light of *SWANCC*, the pertinent Royce Property waters still fall within the purview of *SWANCC*. The government's apparent position is that the wetlands at issue are not isolated. In any event, for present purposes, it will be assumed that the waters at issue actually are nonnavigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water.[7] If it is held that, under that factual assumption, defendants would be entitled to modification of the Decree or other relief, further proceedings would be necessary to resolve any genuine and material factual disputes regarding the nature of the wetlands.

The Decree contains the following provisions that are particularly pertinent to the present dispute:

> 2. The Court shall retain jurisdiction in order to enable any party to apply to the Court at any time for such further relief as may be necessary to interpret, enforce, or modify this Decree.

* * * * * *

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[7] Defendants represent that all the bodies of water at issue are located 1.5 to 2 linear miles from nonnavigable Salt Creek and 7 to 7.5 linear miles from the nearest navigable body of water, the Des Plaines River. In their reply, defendants further represent that Salt Creek is 1.9 or more stream miles from each body of water and that the Des Plaines River is 19.1 or more stream miles from each body of water. According to the report of defendants' expert, all of the Royce Property's drainage "appears" to flow into a manhole that "appears" to connect to an underground storm sewage system which runs for 2000 feet before flowing into a small ditch that goes for 1.5 miles before joining Salt Creek. Schaefer Report ¶¶ 22-24. The expert states that this manhole has existed since at least 1986.

10. Except as specifically modified herein, the terms "waters of the United States"; . . . shall have the meanings assigned them at 40 C.F.R. § 230.3 or 33 C.F.R. § 323.2 . . . .

* * * * * *

V. WATERS OF THE UNITED STATES

17. For purposes of this Consent Decree, the parties shall treat wetland and open water areas depicted on Exhibit 1, together with the new wetland and open water area created pursuant to Part VII (injunctive relief) and depicted on Exhibit 2, as waters of the United States located on the Royce Renaissance Property.

* * * * * *

19. The Defendants hereby elect delineation for the Royce Renaissance Property pursuant to the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989). Further, the Parties agree that the boundaries of the alleged waters of the United States referenced in Paragraph 17 and depicted on Exhibit 1 would not differ if the delineation had been conducted pursuant to the Corps of Engineers Wetland Delineation Manual (1987).

20. The boundaries depicted in Exhibits 1 and 3[8] shall bind the parties for the life of this Consent Decree unless and until a new Corps or EPA delineation is made pursuant to the final version of a revised wetland delineation manual. The Defendants shall not request a new jurisdictional determination from either the Corps or EPA for the Royce Renaissance Property or the Sullivan Lake Property during the life of this Consent Decree

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[8] Exhibit 3 pertains to the Sullivan Lake Property.

unless and until the government issues the final version of a revised wetland delineation manual.

20A. The Defendants shall continue to treat wetland and open water areas depicted on Exhibit 1 as waters of the United States until the mandate issues in *Hoffman Homes, Inc.* v. *EPA*, No. 90-3810 (7th Cir. April 20, 1992) and until proceedings related to any appeal, petition for certiorari, or remand are completed. Following completion of these proceedings, unless pertinent portions of the Seventh Circuit's April 20, 1992 decision are reversed, Exhibit 1 areas W2A, W2B, W3, W5B, and W9 shall be excluded from the obligations imposed in Paragraph 17.

Courts have always had the inherent power to reconsider or modify their judgments within a reasonable period of time. *See In re Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). That power, however, has been merged into Rule 60 of the Federal Rules of Civil procedure. There are no separate inherent powers that are more expansive than those provided for in Rule 60(b). *See id.*; *In re Wyciskalla*, 156 B.R. 579, 580 (Bankr. S.D. Ill. 1993); *Blair* v. *Delta Air Lines, Inc.*, 344 F. Supp. 367, 368 (S.D. Fla. 1972), *aff'd*, 477 F.2d 564 (5th Cir. 1973) (adopting district court opinion); Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §§ 2851-52 (2d ed. 1995). *See also Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, Local 182B* v. *Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995). Additionally, pursuant to Rule 60(b), this court would have the power to modify the Decree even without the express provision contained in ¶ 2 of the Decree. *See Picon* v. *Morris*, 933 F.2d 660, 662 (8th Cir. 1991). The language of ¶ 2 does not provide any additional or greater powers of modification that this court

did not already have under Rule 60(b).[9] Defendants' present motion must be considered as a Rule 60(b) motion. The arguments as to the judgment being void as an *ultra vires* agreement will be considered under various subsections of Rule 60(b) and the argument as to modification in light of a change of law will be considered as a Rule 60(b)(5) motion.

Defendants contend the Decree is a contract and that it should be treated as such in ruling on the pending motion. It is true that, "[f]rom the standpoint of interpretation, a consent decree is a contract." *Cook* v. *City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999). A consent decree, however, is contractual in nature in only "some respects." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). "[I]t is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Id.* "[F]rom the standpoint of remedy it is an equitable decree," subject to equitable remedies. *Cook*, 192 F.3d at 695.

The government does not dispute defendants' contention that, where the requisite consent is lacking, a contract is void *ab initio*. However, it is not a mere contract that is before this court, it is a consent decree that has been entered as a judgment. If the judgment is void, Rule 60(b)(4) provides that the judgment is to be vacated. The parties' contract being void is not the same as the judgment itself being void. A judgment is void if it is without subject matter jurisdiction, there was no personal jurisdiction over a party, or the judgment was entered

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[9] Paragraph 2 states that motions to modify the Decree may be brought "at any time." Arguably, that provision could be construed as permitting Rule 60(b) motions to be brought at any time. However, no order of the court can extend the time limits contained in Rule 60(b). *See* Fed.R.Civ.P. 6(b); *United States* v. *Deutsch*, 981 F.2d 299, 302 (7th Cir. 1992). Paragraph 2 should not be construed as having an effect that is inconsistent with the governing law. Even if it were to be so construed, it would have no effect because Rule 6(b) provides that no court order can extend the time limits of Rule 60(b).

without due process of law. *Federal Election Commission* v. *Al Salvi for Senate Committee*, 205 F.3d 1015, 1019 (7th Cir. 2000); Wright, Miller, & Kane § 2862 at 326-69; *United States* v. *Beebe*, 180 U.S. 343, 350-51 (1901). The fact that a party to a consent judgment lacked authority to consent (as defendants contend is true of the United States in light of *SWANCC*) does not void the judgment itself. *Beebe*, 180 U.S. at 350-51 (judgment not void where district attorney lacked authority to compromise absent express approval of Solicitor of the Treasury); *Phelan* v. *Bradbury Building Corp.*, 7 F.R.D. 429, 432 (S.D.N.Y. 1947) (judgment not void even if parties lacked authority to settle because, subsequent to entry of judgment based on settlement of FLSA overtime claim, Supreme Court held that statute prohibited settlement of such claims for less than full damages). *Contra National Revenue Corp.* v. *Violet*, 807 F.2d 285, 288 (1st Cir. 1986) (consent decree void under Rule 60(b)(4) because Rhode Island Attorney General did not have authority to stipulate state statute violated the federal Constitution).[10] As was previously held in this litigation, defendants' contentions as to the wetlands not being United States waters and there being an insufficient interstate commerce nexus do not go to the court's subject matter jurisdiction and therefore do not state a basis for voiding the judgment pursuant to Rule 60(b)(4). *Krilich IV*, 209 F.3d at 971-72;[11] *Interstate General*, 152 F. Supp. 2d at 848. Even assuming that, in light of *SWANCC*, none of the wetlands that are a subject of the Decree are actually waters of the United

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[10] This holding in *Violet* is inconsistent with the Supreme Court holding in *Beebe* and the well-established case law as to the limited grounds for finding a judgment to be void under Rule 60(b)(4).

[11] The Seventh Circuit considered whether the wetlands not being waters of the United States or not having a sufficient nexus to interstate commerce went to this court's subject matter jurisdiction and held that it did not. At that time, defendants did not explicitly argue that the government engaged in an *ultra vires* act by consenting to the Decree.

States subject to regulation under the CWA, no basis is stated for vacating the Decree as void pursuant to Rule 60(b)(4). *Interstate General*, 152 F. Supp. 2d at 848; *cf. Phelan*, 7 F.R.D. at 432.

Though not stating a basis for relief pursuant to Rule 60(b)(4), the government's alleged lack of authority to enter into the Decree may state a basis for relief under another subsection of Rule 60(b). Before the existence of Rule 60(b), the Supreme Court held in *Beebe* that an attorney's lack of authority could state a basis for vacating a judgment even if that basis was not that the judgment itself was void. *See Beebe*, 180 U.S. at 351-53. Such grounds, though, must be timely raised and are subject to the possibility that the principal ratified the attorney's action either expressly or through conduct. *See id.* Modern cases denominate a motion to vacate based on an attorney lacking authority to enter into a settlement agreement as a Rule 60(b)(1) motion based on mistake or inadvertence. *See Bradford Exchange* v. *Trein's Exchange*, 600 F.2d 99, 102 (7th Cir. 1979). A Rule 60(b)(1) motion must be brought within one year of the entry of judgment. Of course, defendants are not contending that the government's attorneys lacked authority from their principal as in *Beebe* and *Bradford Exchange*, but they are contending that the parties were mistaken as to the government's authority to regulate the wetlands at issue. Defendants' *ultra vires* contentions, therefore, may properly be classified as being a claim of mistake of law under Rule 60(b)(1). *Cf. Webb* v. *James*, 147 F.3d 617, 622 (7th Cir. 1998). Since it is more than a year since the entry of judgment, the motion is untimely when classified as a Rule 60(b)(1) motion.

But even assuming the *ultra vires* contention instead falls within the catch-all provision of Rule 60(b)(6)[12] and was

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[12] Rule 60(b)(6) provides for relief based on "any other reason justifying relief from the operation of the judgment." Such relief, however, is limited

brought within a reasonable period of time, it would fail on its merits. In the Decree, the parties agreed that the pertinent Royce Property wetlands currently at issue were waters of the United States. Defendants are bound by that stipulation. *See Krilich IV*, 209 F.3d at 972. *Compare also Hugi* v. *United States*, 164 F.3d 378, 380-81 (7th Cir. 1999). That these facts go to the federal government's authority to regulate the wetlands does not prevent defendants from being bound by the stipulations. *See, e.g., Krilich IV, supra*; *Hugi, supra*; *Interstate General*, 152 F. Supp. 2d at 848. Moreover, this is a post-judgment attack on the government's authority that comes more than eight years after entry into the Decree. Just as a colorable basis for subject matter jurisdiction is enough to defeat an attack on a judgment being void for subject-matter jurisdiction, *see Krilich III*, 1999 WL 182333 at *1- 2, a colorable basis for the wetlands being subject to CWA regulation should be enough to defeat the present *ultra vires* contention. At the time the parties entered into the Decree, a colorable basis existed for finding the wetlands subject to CWA regulation.[13] *See id.* at *2.

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to circumstances that are not otherwise covered by the other subsections of Rule 60(b). *See Webb*, 147 F.3d at 622; *Helm* v. *Resolution Trust Corp.*, 84 F.3d 874, 878-79 (7th Cir. 1996); *Met-L-Wood*, 861 F.2d at 1018.

[13] To the extent there is a basis for the government to contend that the wetlands are not isolated, a colorable basis for CWA regulation continues to exist. Cases subsequent to *SWANCC* have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters. *See Headwaters, Inc.* v. *Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation ditches that connect to streams that flow to navigable waters are waters of the United States); *Interstate General*, 152 F. Supp. 2d at 844, 846 (wetlands that are adjacent to nonnavigable creeks that connect to a navigable river via at least six miles of intermittent streams and drainage ditches are waters of the United States); *Idaho Rural Council* v. *Bosma*, 143 F. Supp. 2d 1169, 1172-74, 1177-79 & n. 4 (D. Idaho 2001) (spring that runs into pond that drains across a pasture into a canal that flows to a creek, that is either navigable or flows into a navigable river, is a water of the United States); *United States* v. *Buday*, 138

But even if defendants are not bound by the stipulation, another ground still exists for denying relief on the *ultra vires* contention. There is no contention that the Sullivan Lake property does not contain wetlands subject to CWA regulation, even in light of *SWANCC*. Therefore, the government was not without authority to enter into the Decree. It would not matter that the Decree also has provisions imposing obligations as to wetlands that are not subject to CWA regulation. Under a consent decree, a party can agree to greater obligations than could be achieved if the suit were to go to trial. *Rufo*, 502 U.S. at 389; *Komyati* v. *Bayh*, 96 F.3d 955, 959 (7th Cir. 1996); *Kasper* v. *Board of Election Commissioners of Chicago*, 814 F.2d 332, 342-43 (7th Cir. 1987). A consent decree, however, cannot oblige a party to perform illegal conduct. *Rufo*, *supra*; *Kasper*, *supra*. It is not illegal to preserve isolated, nonregulated wetlands or to create new wetlands to replace ones that have been destroyed. The provisions of the Decree were lawful and based on a substantive, colorable claim even if Sullivan Lake was the only property that had wetlands subject to CWA regulation. Even applying *SWANCC* retrospectively and assuming the Royce Property wetlands are not waters of the United States, the government was not without authority to enter into the Decree.

In sum, the *ultra vires* argument fails for four different reasons, each of which is sufficient by itself to deny the presently requested relief. First, even if the government went beyond its authority, that does not void the judgment even if it would void a contract. Second, defendants are bound by the stipulation that the wetlands are waters of the United States.

F. Supp. 2d 1282 (D. Mont. 2001) (wetlands adjacent a creek that flowed into a creek that flowed into a river that was navigable a further 190 miles downstream are waters of the United States); *Aiello* v. *Town of Brookhaven*, 136 F. Supp. 2d 81, 119 & n. 30 (E.D.N.Y. 2001) (pond and creek that emptied into lake that flows into navigable bay are waters of the United States).

Third, it is too late to now contend that the parties were mistaken as to the wetlands being waters of the United States. Fourth, the government's agreement to enter into the Decree was not *ultra vires* because the Sullivan Lake property contains wetlands subject to CWA regulation.

Still to be considered is whether the Decree should be modified in light of the change of law represented by *SWANCC*. While the parties were negotiating, the Seventh Circuit decided *Hoffman Homes, Inc.* v. *Administrator, United States EPA*, 961 F.2d 1310 (7th Cir. 1992) ("*Hoffman I*"). *Hoffman I* holds that "isolated wetlands" are not subject to CWA regulation. The government provides correspondence[14] showing that the parties were aware of *Hoffman I* and that, as a result, the decree in negotiation was modified to exclude specified wetlands that defendants contended were isolated. The parties also took into account the possibility that *Hoffman I* would be reversed. These provisions are incorporated in ¶ 20A of the Decree. After the case was filed, but before the Decree was approved and entered as a judgment, *Hoffman I* was vacated for rehearing. Almost nine months after the Decree was entered, the Seventh Circuit decided *Hoffman Homes, Inc.* v. *Administrator, United States EPA*, 999 F.2d 256 (7th Cir. 1993) ("*Hoffman II*"). *Hoffman II* holds that the wetlands at issue did not meet the regulatory definitions of waters of the United States and therefore found it unnecessary to consider whether an isolated wetland could qualify as a water of the United

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[14] This correspondence is being considered in determining whether the history of this case supports modification in light of a change of law. The correspondence is not being used to construe the meaning of the Decree and no opinion is expressed regarding whether it would have been appropriate to consider the correspondence as extrinsic evidence pertinent to interpreting ¶ 20A.

States.[15] Later in 1993, the Seventh Circuit issued an opinion supporting that isolated wetlands were properly subject to regulation under the CWA. *See Rueth* v. *United States EPA*, 13 F.3d 227, 231 (7th Cir. 1993).

In November 1998, defendants moved to vacate the penalties that had been imposed for violation of the Decree. *See Krilich I*; *Krilich II*. For the first time, defendants raised the contention that the Royce Property wetlands that were the subject of the Decree were not subject to CWA regulation because they were isolated wetlands. This court held that "[t]here was and continues to be a colorable basis for exercising jurisdiction over the Decree's subject matter and it cannot be held that jurisdiction in this case was totally wanting." *Krilich III*, 1999 WL 182333 at *2. Since defendants sought only retrospective relief (vacating a money judgment), the merits of modifying the Decree in light of a claimed change of law was not considered. *See id.* at *3.[16] The Seventh Circuit affirmed, holding that the issue did not go to this court's subject matter jurisdiction and therefore could not be a basis for vacating the judgment as void. *See Krilich IV*.

Between *Krilich III* and *Krilich IV*, the Seventh Circuit issued its opinion in *SWANCC*, which upheld the Migratory Bird Rule as constitutional and within the agencies' authority under the CWA. 191 F.3d 845 (7th Cir. 1999). That decision was reversed by the Supreme Court's decision in *SWANCC* holding that the Migratory Bird Rule exceeded the agencies' authority under the statute. Defendants contend the Decree

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[15] *Krilich I*, 948 F. Supp. at 721-25, construes the meaning of ¶ 20A and rejected the government's contention that *Hoffman II* was a "reversal" of *Hoffman I* such that the isolated wetlands that had been expressly excluded from the Decree should be considered waters of the United States.

[16] The claimed change of law was a Fourth Circuit case holding that the Migratory Bird Rule exceeded the Army Corps' statutory authority under the CWA. *See United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

should be modified in light of the Supreme Court's decision in *SWANCC*.

Rule 60(b)(5) provides in part that a judgment may be modified or vacated if "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Although defendants contend the prior clause is satisfied, that provision is clearly inapplicable to this case. That provision is limited to judgments that were the basis of issue or claim preclusion; it does not apply to reversals of cases that were relied upon as precedent. Wright, Miller, & Kane § 2863 at 335. Therefore, defendants' only possible relief is prospective relief under the last clause. *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997); *Krilich III*, 1999 WL 182333 at *3.

Under the last clause of Rule 60(b)(5), modification of a consent decree can only be appropriate if the parties based their agreement on a misunderstanding of the law. *Rufo*, 502 U.S. at 390. At the time defendants originally agreed to the relevant portions of the Decree, Seventh Circuit case law (*Hoffman I*) held that isolated wetlands were not subject to CWA regulation. *SWANCC* did not narrow the application of the CWA any more than did *Hoffman I*. Paragraph 20A of the Decree was drafted in light of *Hoffman I*. When *Hoffman I* was vacated for rehearing prior to actual entry of the Decree, the Decree was not modified to take that into account. Therefore, the Decree, as it now stands, was drafted in light of controlling precedent that was no less favorable to defendants than *SWANCC*. It was not drafted in light of subsequent Seventh Circuit precedent that, unlike *Hoffman I*, was overruled by the Supreme Court's decision in *SWANCC*. Also, the Decree does not oblige defendants to perform any act that is now unlawful in light of current law. Equity does not require that the Decree be reopened so that defendants may now litigate whether the wetlands on the property are actually isolated. Defendants chose not to do so more than eight years ago and the legal

framework has not changed in a manner that would justify doing it today. *Cf. Interstate General*, 152 F. Supp. 2d at 847-48.

For the foregoing reasons, defendants' motion to vacate the consent decree will be denied.

IT IS THEREFORE ORDERED that defendants' motion to vacate the consent decree [141-1] is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT R. KRILICH, KRILICH COMPANIES, INC. RIVERWOODS DEVELOPMENT CORP., LAKEMOOR COUNTRY CLUB, INC., AUSTIN STATE BANK, not individually, but as Trustee under the Trust Agreement dated December 18, 1968 and known as Trust No. 4580, and MANUFACTURERS' AFFILIATED TRUST CO. f/k/a AFFILIATED BANK FRANKLIN PARK f//k/a/ FIRST STATE BANK & TRUST OF FRANKLIN PARK, not individually, but as Trustee under the Trust Agreements dated July 30, 1982 and known as Trust Nos. 866 and 867, Defendants.	No. 92 C 5354 J. Hart [Filed Aug. 10, 1992]

CONSENT DECREE

WHEREAS, the United States brought this case on behalf of the Environmental Protection Agency ("EPA") to restrain alleged violations of Clean Water Act ("CWA") sections 301(a) and 404, 33 U.S.C. § 1311(a) and 1344, at two separate Chicago areas construction sites;

WHEREAS, the United States seeks both permanent injunctive relief (including restoration of certain wetland and open water areas and on-site and off-site mitigation) and an appropriate civil penalty; and

WHEREAS, the parties agree that a settlement is in their mutual interest and in the public interest;

NOW, THEREFORE before taking any testimony, and without admission of fact, law, or liability by either party, (except as provided in Paragraph 1), it is hereby ORDERED, ADJUDGED, and DECREED:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and pursuant to Clean Water Act sections 309(b) and 404(s), 33 U.S.C. §§ 1319(b), 1344(s). This Court has obtained jurisdiction over the parties consenting to entry of this Decree, and venue is proper pursuant to 33 U.S.C. §§ 1319(b), 1344(s).

2. The Court shall retain jurisdiction in order to enable any party to apply to the Court at any time for such further relief as may be necessary to interpret, enforce, or modify this Decree.

II. PARTIES

3. The Plaintiff is the United States of America. The Department of Justice is authorized to bring this suit pursuant to 28 U.S.C. §§ 516 and 519, and CWA § 306, 33 U.S.C. § 1366.

4. Defendant Robert R. Krilich is an individual engaged in the business of developing real estate in the Chicago area.

5. Defendants Krilich Companies, Inc., and Riverwoods Development Corporation are corporations organized under the laws of the State of Illinois, and are engaged in the business of developing real estate in this District. Robert R. Krilich is the sole stockholder, and President of Krilich Companies, Inc., and Riverwoods Development Corporation.

6. Lakemoor Country Club, Inc., is a corporation organized under the laws of the State of Illinois, and engaged in the business of developing real estate in this District. Robert R. Krilich owns one hundred percent (100%) of the stock in that corporation.

7. Defendants Manufacturers' Affiliated Trust Co. f/k/a Affiliated Bank/Franklin Park f/k/a First State Bank & Trust of Franklin Park, and Austin State Bank are the Trustees of certain Illinois Land Trusts formed pursuant to Illinois law for the sole benefit of Defendant Robert R. Krilich.

III. SUBJECT PROPERTY

8. The property owned and controlled by Defendant Robert Krilich as beneficiary of Manufacturers' Affiliated Trust Co. f/k/a Affiliated Bank/Franklin Park f/k/a First State Bank & Trust of Franklin Park Trust Nos. 866 and 867 in Oakbrook Terrace, and subject to remediation under this Decree (the "Royce Renaissance Property"), is located near the intersections of Butterfield Road and Royce Boulevard, and is legally described as follows:

> The Southeast quarter of Section 21,Township 39N, Range 11E, Village of Oakbrook Terrace, DuPage County, Illinois.

9. The property owned and controlled by Defendant Robert Krilich as beneficiary of Austin State Bank Trust No. 4580 in McHenry and Lake Counties, and subject to remediation under this Decree (the "Sullivan Lake Property"), is located between Illinois Route 60 and Sullivan Lake Road, West of the Village of Volo, Illinois, and is legally described as follows:

The Southeast Quarter of Section 29, Township 45 North, Range 9 East, McHenry County, Illinois.

- and -

The Southwest Quarter of Section 28, Township 45 North, Range 9 East, Lake County, Illinois.

IV. DEFINITIONS

10. Except as specifically modified herein, the terms "waters of the United States"; "wetlands"; "dredged material"; "fill material"; "discharge of dredged material"; and "discharge of fill material" shall have the meanings assigned them at 40 C.F.R. § 230.3 or 33 C.F.R. § 323.2. "EPA" means the United States Environmental Protection Agency, and "Corps" means the United States Army Corps of Engineers.

11. As used in this Consent Decree, the terms "restore" and "restoration" refer to removal of dredged or fill material from the waters of the United States, together with replanting and other measures intended to reinstate the natural conditions allegedly prevailing prior to activities giving rise to this action.

12. As used in this Consent Decree, the terms "mitigate" and "mitigation" refer to creation of new wetland and open water areas as compensation for alleged temporal loss of waters of the United States the Defendant will restore pursuant to the terms of this Consent Decree, and for alleged permanent loss of waters of the United States that will not be restored. As used in this Consent Decree, the term "on-site mitigation" refers to the 3.10 acre area located on the Royce Renaissance Property and

depicted on Exhibit 2 and to the 1.5 acre area located on the Sullivan Lake Property and depicted on Exhibit 3. As used in this Consent Decree, the term "off-site mitigation" refers to the 2.08 acre area to be constructed as additional mitigation for the alleged loss of wetland on the Royce Renaissance Property, as provided in Paragraph 31 of this Decree.

13. The "Royce Renaissance Plan" is the Wetland Restoration and Mitigation Summary Document attached as Exhibit 4, and is incorporated herein by reference. In case of ambiguity or conflict between the Royce Renaissance Plan and this Consent Decree, the provisions of this Decree shall control.

14. The "Royce Renaissance Defendants" are Robert R. Krilich, Krilich Companies, Inc., and Riverwoods Development Corp., together with associated persons or entities described in Paragraph 81 of this Decree.

15. The "Sullivan Lake Defendants" are Robert R. Krilich, Krilich Companies, Inc., and Lakemoor Country Club, Inc., together with associated persons or entities described in Paragraph 81 of this Decree.

16. The "Trust Defendants" are Manufacturers' Affiliated Trust Co. f/k/a Affiliated Bank/Franklin Park f/k/a First State Bank & Trust of Franklin Park, not individually, but as Trustee under the Trust Agreements dated July 30, 1982 and known as Trust Nos. 866 and 867, and Austin State Bank, not individually, but as Trustee under the Trust Agreement dated December 18, 1968 and known as Trust No. 4580.

V. WATERS OF THE UNITED STATES

17. For purposes of this Consent Decree, the parties shall treat wetland and open water areas depicted on Exhibit 1, together with the new wetland and open water area created pursuant to Part VII (injunctive relief) and depicted on Exhibit 2, as waters of the United States located on the Royce Renaissance Property.

18. For purposes of this Consent Decree, the parties shall similarly treat wetland and open water areas depicted on Exhibit 3, together with the 1.02 acre wetland mitigation area already created by the Sullivan Lake Defendants and depicted on Exhibit 3, as waters of the United States located on the Sullivan Lake Property.

19. The Defendants hereby elect delineation for the Royce Renaissance Property pursuant to the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989). Further, the Parties agree that the boundaries of the alleged waters of the United States referenced in Paragraph 17 and depicted on Exhibit 1 would not differ if the delineation had been conducted pursuant to the Corps of Engineers Wetland Delineation Manual (1987).

20. The boundaries depicted in Exhibits 1 and 3 shall bind the parties for the life of this Consent Decree unless and until a new Corps or EPA delineation is made pursuant to the final version of a revised wetland delineation manual. The Defendants shall not request a new jurisdictional determination from either the Corps or EPA for the Royce Renaissance Property or the Sullivan Lake Property during the life of this Consent Decree unless and until the government issues the final version of a revised wetland delineation manual.

20A. The Defendants shall continue to treat wetland and open water areas depicted on Exhibit 1 as waters of the United States until the mandate issues in *Hoffman Homes, Inc.* v. *EPA*, No. 90-3810 (7th Cir. April 20, 1992) and until proceedings related to any appeal, petition for certiorari, or remand are completed. Following completion of these proceedings, unless pertinent portions of the Seventh Circuit's April 20, 1992 decision are reversed, Exhibit 1 areas W2A, W2B, W3, W5B, and W9 shall be excluded from the obligations imposed in Paragraph 17.

VI. DESIGNATED PROJECT COORDINATORS

21. All reports, plans, approvals, disapprovals, and other written communication required or permitted by this Consent Decree shall be sent to each party's designated Project Coordinator. The project coordinators are:

For EPA:

Douglas A. Ehorn
Chief, Wetlands and Watersheds Section
U.S. Environmental Protection Agency
77 West Jackson Boulevard - WQW-16J
Chicago, IL 60604

For Royce Renaissance Defendants:
Kerry Plencner
Vice President
Krilich Companies Inc.
1000 Royce Boulevard
Oak Brook Terrace
Oak Brook, IL 60181
For Sullivan Lake Defendants:

Kerry Plencner
Vice President
Krilich Companies Inc.
1000 Royce Boulevard
Oak Brook Terrace
Oak Brook, IL 60181

VII. INJUNCTIVE RELIEF

22. Each Defendant is permanently enjoined from discharging dredged or fill material in violation of Clean Water Act § 301, 33 U.S.C. § 1311.

23. The Royce Renaissance Defendants shall not discharge dredged or fill material into the areas depicted as waters of the

United States on Exhibits 1 and 2 without obtaining and fully complying with the terms of a permit issued by the United States Army Corps of Engineers pursuant to Clean Water Act § 404, 33 U.S.C. § 1344, and shall take all reasonable measures to prevent others from doing so.

24. The Sullivan Lake Defendants shall not discharge dredged or fill material into the areas depicted as waters of the United States on Exhibit 3 without obtaining and fully complying with the terms of a permit issued by the Corps pursuant to Clean Water Act § 404, 33 U.S.C. § 1344, and shall take all reasonable measures to prevent others from doing so.

a. Wetland Boundary Identification

25. The Royce Renaissance Defendants and the Sullivan Lake Defendants, respectively, shall mark the boundaries of the alleged waters of the United States depicted on Exhibits 1 and 3 using surveying stakes with appropriate flagging under the on-scene supervision of an EPA representative, not later than 30 days after the entry of this Consent Decree. The same Defendants shall not disturb those markers for any reason, shall take all reasonable measures to prevent others from disturbing those markers, and shall promptly replace markers disturbed by others in accordance with the survey provided for in Paragraph 28.

26. The Royce Renaissance Defendants shall mark the boundaries of the on-site mitigation area at the Royce Renaissance Property, as depicted on Exhibit 2, using surveying stakes with appropriate flagging under the on-scene supervision of an EPA representative not later than 30 days after completion of initial excavation and grading in accordance with Paragraph 30. The same Defendants shall not disturb those markers for any reason, shall take all reasonable measures to prevent others from disturbing those markers, and shall promptly replace markers disturbed by others in accordance with the survey provided for in Paragraph 28.

27. The Sullivan Lake Defendants shall mark the boundaries of the on-site mitigation area, as depicted on Exhibit 3, using surveying stakes with appropriate flagging under the on-scene supervision of the EPA representative, not later than 30 days after entry of this Consent Decree. The same Defendants shall not disturb those markers for any reason, shall take reasonable measurers to prevent others from disturbing those markers, and shall promptly replace markers disturbed by others in accordance with the survey provided for in Paragraph 28.

28. The Defendants shall arrange for a professional survey of the boundary markers placed pursuant to Paragraphs 25 through 27, and shall provide EPA's project coordinator with a copy of each survey no later than 60 days after entry of this Consent Decree for Paragraphs 25 and 27 and 30 days after placement of the markers in accordance with Paragraph 26.

b. Restoration/Mitigation—Royce Renaissance

29. The Royce Renaissance Defendants shall restore the alleged loss of the waters of the United States on the Royce Renaissance Property in accordance with the Royce Renaissance Plan, and in accordance with the following schedule:

Deadline:	Task:
August 31, 1992	Complete removal of spoil piles in areas labelled W1a and W1d on Exhibit 1, complete construction of berm in area W1d, and complete regarding of existing man-made channel in area W1a.
September 30, 1992	Complete planting of the berm in area W1d.

30. The Royce Renaissance Defendants shall create wetlands on-site (as depicted in Exhibits 1 and 2) to mitigate for alleged wetland and open water losses on the Royce Renaissance

Property in accordance with the Royce Renaissance Plan and the following schedule:

Deadline:	Task:
March 1, 1993	Commence initial excavation and grading.
March 31, 1993	Complete initial excavation and grading, and complete installation of flow control structures.
May 15, 1993	Complete planting in the mitigation area.

31. The Royce Renaissance Defendants shall further create at least 2.08 acres of off-site wetlands in accordance with the Royce Renaissance Plan and the following schedule:

Deadline:	Task:
September 30, 1992	Submit proposed site to EPA's project coordinator for approval.
November 30, 1992	Submit proposed wetland creation, maintenance and monitoring plan to EPA's project coordinator for approval.
March 1, 1993	Commence initial excavation and grading.
March 31, 1993	Complete initial excavation and grading.
May 15, 1993	Complete planting in the new wetland area.

32. The Royce Renaissance Defendants shall mark the boundaries of the off-site wetland created pursuant to Paragraph 31 using surveying stakes with appropriate flagging under the

on-scene supervision of an EPA representative, not later than 30 days after planting in the new wetland is complete. The same Defendants shall not disturb those markers for any reason, shall take all reasonable measures to prevent other from disturbing those markers, and shall promptly replace markers disturbed by others in accordance with the survey provided for in Paragraph 33.

33. The Royce Renaissance Defendants shall arrange for a professional survey of the boundary markers placed pursuant to Paragraph 32, and shall provide EPA's project coordinator with a coy of the survey no later than 60 days after placement of those markers.

34. This Paragraph has been deliberately left blank.

35. Upon completion of the off-site mitigation work required in accordance with the Royce Renaissance Plan and Paragraph 31, subject to the approval of EPA, the Royce Renaissance Defendants may convey the off-site mitigation area to a public entity or other suitable body subject to the restrictive covenants described in Paragraph 49 and Exhibit 6. Subject to the approval of EPA, the Defendants also may convey the on-site mitigation areas at the Sullivan Lake and Royce Renaissance Properties to a homeowners' association, public entity, or other suitable body subject to the covenants undertaken pursuant to Paragraph 49 and Exhibits 5 and 7.

c. Additional Off-Site Enhancement - Carol Stream.

36. The Royce Renaissance Defendants and Sullivan Lake Defendants shall provide additional off-site enhancement of certain existing wetlands on property owned by Parkway Bank and Trust Co. as Trustee for Trust No. 8429, for the sole benefit of Robert R. Krilich, and legally described as follows ("the Carol Stream Site"):

The Northeast and Southeast Quarters of Section 25, Township 40N, Range 9E, Village of Carol Stream, DuPage County, Illinois.

37. The Royce Renaissance Defendants and the Sullivan Lake Defendants shall conduct the wetland enhancement required pursuant to this subpart c within one of the prospective enhancement areas depicted on Exhibit 8 (marked "wetlands"), or within whatever on-site mitigation area is specified pursuant to any permit the Corps may issue for the discharge of dredged or fill material on the subject parcel.

38. The enhancement work required by this subpart c shall be in addition to, and consistent with, work required pursuant to any permit the Corps may issue in connection with development of the Carol Stream Site. Nothing in this Consent Decree shall be construed as a warranty or other guarantee by the United States that any such permit will issue.

39. The Royce Renaissance Defendants and Sullivan Lake Defendants shall conduct the enhancement required by this subpart c in accordance with an appropriate wetland enhancement plan approved by EPA (the "Carol Stream Plan"), which shall be incorporated by reference in this Consent Decree upon approval by EPA. At a minimum, the plan shall include the following:

a. Unless the site selected differs from the sites depicted on Exhibit 8, increasing the depth of water in the subject area in order to enhance the non-game fish habitat;

b. Creating islands in central portions of the wetlands area in order to enhance waterfowl habitat;

c. Planting suitable high-density wetland plants in the shrub/scrub and emergent zones in order to control erosion and thereby improve water quality;

d. Provision for the expenditure of not less than $16,000.00 on grading and construction, together with procurement and planting of vegetation; and

e. Should the Corps not issue a permit, specification of suitable two-year interim performance standards, and final performance standards, and provision for suitable semi-annual reporting, pursuant to Paragraph 52A.

40. The Royce Renaissance Defendants and the Sullivan Lake Defendants shall conduct the enhancement work in accordance with the following schedule, measured from the date of a decision by the Corps upon pending permit application number 9359111, or from the first anniversary of entry of this Consent Decree, whichever date is sooner.

Deadline:	Task:
60 days	Submit proposed enhancement, maintenance and monitoring plan to EPA's project coordinator for approval.
180 days	Commence initial excavation and grading.
240 days	Complete initial excavation and grading.
270 days	Complete planting in the enhanced wetland area.

41. The Royce Renaissance Defendants and the Sullivan Lake Defendants, collectively, shall notify EPA's project coordinator within 3 business days after each of the tasks listed in Paragraph 40 is complete and available for inspection. EPA shall notify these Defendants' project coordinators in writing within 45 days should any aspect of the work not comply with

the Carol Stream Plan, and these Defendants shall correct any such condition within a reasonable time allowed by EPA and notify EPA within 3 business days after completion that the condition is corrected and available for inspection.

d. Contractor/Restoration Standards

42. Defendants shall arrange for the performance of all wetlands restoration, mitigation, and enhancement work pursuant to this Consent Decree by or under the direct supervision of a contractor with qualifications and experience suitable to conduct wetlands creation, restoration, and enhancement work. Defendants shall provide EPA's project coordinator in writing with the name of the contractor, and the title, qualifications, and experience of the proposed contract personnel no less than 15 working days before commencing any restoration, enhancement or mitigation work. Selection and replacement of the contractor shall each be subject to written approval by EPA on reasonable grounds.

43. The Royce Renaissance Defendants shall notify EPA's project coordinator within 3 business days after each of the tasks listed in Paragraphs 25 through 31 are complete and available for inspection. EPA shall notify Defendants respective project coordinators in writing within 45 days thereafter should any aspect of the work not comply with the Royce Renaissance Plan and Defendants shall correct any such condition within the reasonable time allowed by EPA and notify EPA within 3 business days after completion that the condition is corrected and available for inspection.

44. Should restored wetlands on the Royce Renaissance Property, wetlands created there as on-site mitigation, or wetlands created pursuant to Paragraph 31 as off-site mitigation, respectively, fail to achieve the interim performance standards specified in the applicable restoration or mitigation plans by the date of second anniversary of planting, the Royce Renaissance Defendants shall include proposed corrective

measures, together with a schedule for their implementation, in the next semi-annual report to EPA pursuant to Subpart VII g. EPA shall notify the Royce Renaissance Defendants' project coordinator in writing within 45 days thereafter should any aspect of the proposed corrective measures be inadequate. The Royce Renaissance Defendants shall thereafter make any reasonable changes suggested by EPA, and shall implement the corrective measures plan.

45. Should performance standards be required for wetlands enhanced pursuant to Paragraphs 36 through 41, and if enhancements fail to achieve the interim performance standards by the date of second anniversary of planting, the Royce Renaissance Defendants and the Sullivan Lake Defendants shall include proposed corrective measures, together with a schedule for their implementation, in the next semi-annual report submitted by the Royce Renaissance Defendants pursuant to Paragraph 52A. EPA shall notify the Royce Renaissance Defendants' project coordinator in writing within 45 days thereafter should any aspect of the proposed corrective measures be inadequate. The Royce Renaissance Defendants shall thereafter make any reasonable changes suggested by EPA, and shall implement the corrective measures plan.

e. Site Access

46. The Trust Defendants, Royce Renaissance Defendants, and Sullivan Lake Defendants shall allow any authorized representative of EPA or the Corps, upon presentation of appropriate credentials and telephone notice to the project coordinator, any of the designated alternative persons, or other representative of the Defendants, to enter any site that is the subject of this action, including the site of the off-site mitigation required by Paragraph 31 and the wetlands enhanced at the Carol Stream Site, to monitor compliance with this Consent Decree.

47. This Decree does not limit the authority of the United States to enter, conduct inspections, have access to records, or monitor compliance pursuant to any statute or court order.

f. Mitigation Guarantee/Restrictive Covenants

48. The Trust Defendants, Royce Renaissance Defendants and Sullivan Lake Defendants, respectively, shall maintain those areas provided as mitigation (as depicted on Exhibits 2 and 3) as vegetated wetlands for so long as they own the mitigation portions of the Royce Renaissance Property, the Sullivan Lake Property, or the off-site mitigation property referenced in Paragraph 31, and shall take all reasonable measures to prevent damage by discharge of dredged or fill material, trespass, or other disturbance by others.

49. The Trust Defendants, Royce Renaissance Defendants, and Sullivan Lake Defendants hereby declare that whatever interest they, or any of them, may have in the Royce Renaissance or Sullivan Lake Properties, together with any interest they, or any of them, may acquire in the off-site mitigation property, whether legal, equitable, or otherwise, shall be held, sold, distributed, or conveyed only subject to, and in accordance with, covenants in the form attached to this Consent Decree as Exhibits 5, 6, and 7.

50. The parties to this Consent Decree hereby express their mutual intention that the covenants undertaken pursuant to Paragraph 49 and Exhibits 5, 6, and 7 bind the parties, their heirs, successors, assigns, and any subsequent purchaser of any interest in any portion of the Royce Renaissance or Sullivan Lake Properties or the off-site mitigation property required by Paragraph 31.

51. Within 30 days after the boundaries of each mitigation area are surveyed, as provided for in Paragraphs __ and __, the Royce Renaissance and Sullivan Lake Defendants shall execute and record their respective covenants by filing a copy in the appropriate local property records, and shall attach a copy of

the same covenants to any instrument of conveyance prepared in connection with the mitigation portions of the Royce Renaissance and Sullivan Lake Properties or the off-site mitigation area, and shall similarly attach a copy of the same covenants to any development plan or plat submitted to any municipal or other authority, or otherwise made public, in connection with the mitigation portions of the Royce Renaissance or Sullivan Lake properties or areas adjacent to or encompassing such mitigation areas.

52. The 3.10 acre on-site mitigation area on the Royce Renaissance Property, the 1.0 acre on-site mitigation area on the Sullivan Lake Property, and the off-site mitigation area created pursuant to Paragraph 31, are provided to mitigate for the alleged loss of wetland and open water areas on the Royce Renaissance and Sullivan Lake Properties, and shall not be available to provide mitigation for other projects, including but not limited to any application for a Section 404 permit.

g. Reporting

52A. The Royce Renaissance Defendants shall provide EPA's project coordinator with semi-annual progress reports beginning September 30, 1993, and continuing thereafter not later than March 31 and September 30 for the life of their Consent Decree. Such semi-annual report shall include, at a minimum:

1. A description of the specific actions taken by the Royce Renaissance Defendants during the preceding semi-annual period to comply with the terms of the Consent Decree, and a projection of action to be taken for the following semi-annual period;

2. A complete monitoring and management report describing the condition and re-growth of restored wetlands, on-site mitigation areas, off-site mitigation areas, and, if required pursuant to Paragraph 39e, the

Carol Stream enhancement project, together with the Royce Renaissance Defendants' activities in those areas;

3. A statement of compliance or noncompliance with the requirements of this Consent Decree; and

4. In the event of any noncompliance, a specific statement of the reason(s) for that noncompliance, together with a plan for preventing such noncompliance in the future.

52B. Semi-annual reports submitted pursuant to this subpart g shall be signed by an officer of Krilich Companies, Inc., at the time of the submission, under the following certification:

> "I certify under penalty of law that this document and any attachments were prepared under my direction or supervision in accordance with a system designed to assure qualified personnel properly gather and evaluate the information submitted. Based on my directions and my inquiry of the person(s) who manage the system, or the person(s) directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete."

52C. Defendants shall not object to the admissibility of any semi-annual report in any proceeding to enforce this Consent Decree. Compliance with the reporting requirements imposed by this Consent Decree shall not relieve Defendants of any other requirements imposed by Federal or State laws and regulations.

VIII. CIVIL PENALTY

53. Within 30 days after entry of this Consent Decree, the Royce Renaissance and Sullivan Lake Defendants shall pay a civil penalty, without admission of liability, in the amount of the one hundred and eighty-five thousand dollars ($185,000) to the United States of America. Payment shall be made by

certified or cashier check, payable to "Treasurer, United States of America" and delivered to the United States Department of Justice, Attention: Michael D. Rowe, Environment and Natural Resources Division, P.O. Box 23986, Washington, DC 20026-3986. Defendants shall simultaneously send a copy of the check to EPA's project coordinator.

54. In consideration of the actions that will be performed and the penalties that will be paid by the Royce Renaissance Defendants and the Sullivan Lake Defendants pursuant to this Consent Decree, the United States covenants not to take action to assess an administrative penalty against the same Defendants pursuant to Clean Water Act § 309(g), 33 U.S.C. § 1319(g), for violations of Clean Water Act § 301(a), 33 U.S.C. § 1311(a), based on a discharge of dredged or fill material without the required section 404 permit (33 U.S.C. § 1344) at the Royce Renaissance Property (in the case of the Royce Renaissance Defendants) and the Sullivan Lake Property (in the case of the Sullivan Lake Defendants) prior to the date of lodging of this Consent Decree. This covenant not to take action to assess an administrative penalty is conditioned upon satisfactory performance by the Royce Renaissance Defendants and the Sullivan Lake Defendants of their respective obligations under this Consent Decree. The covenant extends only to the Royce Renaissance Defendants and the Sullivan Lake Defendants, and not to any other person or entity.

IX. STIPULATED PENALTIES

55. The Royce Renaissance Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty of two thousand five hundred dollars ($2,500.00) per day for each of the following violations of this Decree:

a. failure to timely mark wetland boundaries in accordance with Paragraphs 25, 26, and 32;

b. failure to complete initial planting and restoration of restoration and mitigation areas in accordance with Paragraphs 29 through 31 and Exhibit 4;

c. movement by the Royce Renaissance Defendants of the surveying stakes after placement approval by EPA in violation of Paragraphs 25, 26, and 32;

d. failure to correct any conditions noted by EPA as being inconsistent with the Royce Renaissance Plan in a timely fashion as required by Paragraph 43;

e. violation of the mitigation guarantee/restrictive covenant provisions found in the applicable portions of Paragraphs 49 through 51.

56. The Royce Renaissance Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty of a thousand dollars ($1,000.00) per day for each of the following violations of this Decree:

a. failure to timely deliver a survey of those wetland boundaries in accordance with Paragraph 28 and 33;

b. failure to timely deliver information regarding contractor identification and qualifications in accordance with Paragraph 42;

c. failure to timely submit semi-annual reports in accordance with subpart VII g;

d. failure to timely notify EPA's project coordinator when each of the tasks listed in Paragraphs 25-31 is complete and available for inspection as required by Paragraph 43.

e. failure to timely notify EPA's project coordinator when conditions have been corrected and are ready for inspection as required by Paragraph 43.

57. The Sullivan Lake Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty of

two thousand five hundred dollars ($2,500.00) per day for each of the following violations of this Decree:

a. failure to timely mark wetland boundaries in accordance with Paragraph 27;

b. movement by the Sullivan Lake Defendants of the surveying stakes after placement approval by EPA as prohibited in Paragraph 27.

c. violation of the mitigation guarantee/restrictive covenant provision found in the applicable portions of Paragraphs 49 through 51.

58. The Sullivan Lake Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty of one thousand dollars ($1,000.00) per day for each of the following violations of this Decree:

a. failure to timely deliver a survey of those boundaries in accordance with Paragraph 28.

59. The Royce Renaissance Defendants and the Sullivan Lake Defendants, collectively, shall pay, and shall be jointly and severally liable for, a Stipulated Penalty of two thousand five hundred dollars ($2,500.00) per day for each of the following violations of this Decree:

a. failure to timely submit a proposed enhancement, maintenance, and monitoring plan to EPA's project coordinator in accordance with Paragraph 40;

b. failure to complete initial excavation and grading in accordance with Paragraph 40;

c. failure to complete planting the enhanced wetland area in accordance with Paragraph 40;

60. The Royce Renaissance Defendants and the Sullivan Lake Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty of one thousand dollars

($1,000.00) per day for each of the following violations of this Decree:

a. failure to timely notify EPA's project coordinator when each of the tasks listed in Paragraph 40 is complete and available for inspection, as required by Paragraph 41.

b. failure to timely notify EPA's project coordinator when conditions have been corrected and are ready for inspection as required by Paragraph 41.

c. failure to conduct monitoring and inspections and provide semi-annual reports, if required pursuant to Paragraph 39(e).

61. The Royce Renaissance Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty for each day unpermitted dredged or fill material is discharged, placed, or remains thereafter, in areas depicted as waters of the United States on Exhibit 1 (that is, for each violation of Paragraph 23) in the following amounts:

a. Five thousand dollars ($5,000.00) per day for the first 5 business days of violation;

b. Twenty-five thousand dollars ($25,000) per day for each calendar day of violation thereafter.

c. For purposes of this Consent Decree, a "business day" shall include any nonbusiness day during which construction or other crews are conducting earthmoving, construction or other similar operations of the Royce Renaissance Property.

62. The Sullivan Lake Defendants collectively shall pay, and shall be jointly and severally liable for, a Stipulated Penalty for each day unpermitted dredged or fill material is discharged, placed, or remains thereafter, in areas depicted as alleged waters of the United States on Exhibit 3 (that is, for each violation of Paragraph 24) in the following amounts:

a. Five thousand dollars ($5,000.00) per day for the first 5 business days of violation;

b. Twenty-five thousand dollars ($25,000) per day for each calendar day of violation thereafter.

c. For purposes of this Consent Decree, a "business day" shall include any nonbusiness day during which construction or other crews are conducting earthmoving, construction or other similar operations on the Sullivan Lake Property.

63. Any Defendant who denies an EPA or Corps employee access to either the Royce Renaissance Property or the Sullivan Lake Property, in violation of Paragraph 46 shall pay a Stipulated Penalty of ten thousand dollars ($10,000.00) for each day access is refused, beginning with and including the day access is first refused.

64. Stipulated Penalties specified in this Part IX shall be measured from the date a violation commences, and are not dependent on notice from either EPA, the Corps, or the United States.

65. Defendants shall pay any Stipulated Penalties incurred pursuant to this Part IX no later than the 15th day of the month after a violation occurs and for each month thereafter until the pertinent violation is remedied. Payment shall be by cashier's or certified check made payable to the "Treasurer, United States of America," and delivered to the United States Department of Justice, Attention: Michael D. Rowe, Environment and Natural Resources Division, P.O. Box 23986, Washington, DC 20026-3986. Defendants shall simultaneously send a copy of the check to EPA's project coordinator.

66. The provisions of this Part IX (Stipulated Penalties) shall not be construed to limit any other remedies available to the United States or its Agencies for violations of this Consent Decree, including (but not limited to) proceedings for civil or

criminal contempt, or proceedings to enforce any applicable federal, state, or local statute or regulation. Notwithstanding the foregoing sentence, the Stipulated Penalties provided in Paragraphs 61 and 62 apply to new violations of the Clean Water Act and EPA will not seek additional monetary penalties for those violations pursuant to Clear Water Act 52 259(d)._____ U.S.C. § 1319(d), 1319(g).

67. In the event that voluntary payment of any Stipulated Penalty is not forthcoming, this Decree shall be considered an enforceable judgment for purposes of post-judgment collection in accordance with Fed.R.Civ.P.69, 28 U.S.C., and any other pertinent authority, without further order of the Court.

X. FORCE MAJEURE

68. Defendants' obligation to comply with the terms of this decree may only be excused to the extent that failure to comply, or a delay in complying, arises: a) from a cause beyond the control of, and without the fault of, the Defendant or Defendants in question, and b) from circumstances which could not be prevented by the same Defendants' due diligence. Changed business conditions, economic circumstances, or increased costs of compliance do not constitute force majeure events.

69. Defendants shall adopt all reasonable measures to avoid or minimize any delay properly attributed to a force majeure event. An extension of one compliance date based upon a particular event does not necessarily qualify the Defendants for an extension of any subsequent compliance date.

70. Defendants shall notify the EPA within three (3) business days of the knowledge of commencement of any force majeure event, and shall confirm such notification in writing within seven (7) days thereafter. The written notice shall describe in detail the force majeure event (taking into account the provisions of Paragraph 68), the anticipated length of any delay, the precise cause for the delay, the measures taken and

to be taken by Defendants to prevent or minimize further delay, the proposed timetable by which those measures will be implemented, and the expected impact on the remainder of any applicable schedule.

71. Defendants' failure to take all reasonable measures to minimize any delay in accordance with Paragraph 69, or to timely comply with the notice requirements of Paragraph 70 shall constitute a waiver of the Defendants' rights to invoke the provisions of this Part X (force majeure).

72. If EPA agrees that compliance is excused in accordance with this section, it shall so notify the pertinent Defendants' project coordinator in writing, and shall acknowledge the same Defendants' additional time to perform obligations hindered by the force majeure event. If EPA does not agree, the matter shall be handled in accordance with Part XI (dispute resolution), except that any Defendant seeking relief pursuant to this Part shall have the burden of establishing: 1) that a force majeure event has occurred; 2) that all reasonable measures were taken to minimize any delay, and 3) that the additional time requested is in accordance with the most expeditious schedule practicable.

XI. DISPUTE RESOLUTION

73. Should the parties disagree about any material aspect of the effect or interpretation of this decree, either party may send the other a written notice which outlines the nature of the dispute and requests informal negotiations. If the parties cannot reach an agreed resolution within fifteen (15) working days, any party may thereafter petition the Court to resolve the dispute.

XII. MISCELLANEOUS

74. This Decree does not relieve Defendants of responsibility to obtain and comply with any state or local permits required to conduct the work necessary to comply with the terms of this

Decree. Neither this Decree nor its Exhibits constitutes a permit to discharge a pollutant into the waters of the United States.

75. The United States acknowledges that Nationwide Permit 32, found at 33 C.F.R. Part 330 (56 Fed. Reg. 59110, 59144, Nov. 22, 1991), authorizes the following, subject to the conditions therein provided:

a. discharges of dredged or fill material placed or remaining in alleged waters of the United States depicted on Exhibit 1 as areas W1c, W1d, W2a, W5a, W5b, W6a, W7, and W8b;

b. discharges of dredged or fill material placed or remaining in alleged waters of the United States depicted on Exhibit 3 as areas 5b; and

c. discharges of dredged or fill material incidental to work conducted pursuant to and consistent with the terms, conditions and restrictions of this Consent Decree.

76. The Sullivan Lake Defendants have completed restoration for the alleged loss of the waters of the United States on the Sullivan Lake Property in accordance with the previously approved restoration plan. The Sullivan Lake Defendants have created wetlands on-site to mitigate for the alleged wetland and open water losses on the Sullivan Lake Property as depicted on Exhibit 3.

77. This Consent Decree contains the entire agreement between the parties, and no statements or promises made by any party or its agent that are not contained in this Decree shall be valid or binding.

78. The parties intend that the provisions of this Consent Decree be severable. Should any provision be declared invalid or unenforceable by a court, the remaining provisions shall continue to be effective, and shall continue to bind the parties.

79. Any modification of this Consent Decree shall be in writing and approved by this Court, except that the parties may extend deadlines in accordance with Parts X and XI (force majeure and dispute resolution) without further approval of the Court.

80. Each Party shall bear its own costs, including attorneys' fees.

81. This Consent Decree shall be binding upon each Defendant, its agents, officers, directors, employees, successors, assigns, and all persons, firms, corporations, or other entities acting under, through, or for them, or in active concert or participation with them. Defendants' undertaking of any obligation pursuant to this Consent Decree shall be inclusive of an obligation to exercise whatever control may be necessary to insure that employees and contractors working for them act in accordance with the terms of the Decree.

82. Obligations undertaken collectively by the Royce Renaissance Defendants and the Sullivan Lake Defendants are undertaken jointly and severally. Should one or more of these Defendants fail to perform, the remaining Defendants shall be responsible for performance of the obligation.

83. This Consent Decree does not affect the rights of the United States or its Agencies as against any person or entity that is not bound by this Decree.

84. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to enter into the terms and conditions of this Consent Decree, and to bind the parties they represent to those terms.

85. The Defendants acknowledge that final approval by the United States, and entry of this Consent Decree thereafter, are subject to the public notice and comment requirements of 28 C.F.R. § 50.7.

XIII. TERMINATION

86. This Consent Decree shall terminate on August 31, 1998, if all of the on-site and off-site mitigation and enhancement projects meet the final performance standards set forth in the pertinent exhibits for those projects. If the final performance standards are not met on that date, then this Decree will continue in effect until the standards are met. At any time after the date established in this Paragraph for termination, the Defendants may move to dismiss with prejudice this case and any and all claims under § 404 of the Clean Water Act, 33 U.S.C. § 1344, for acts alleged to have occurred at the Sullivan Lake and Royce Renaissance Properties up to the lodging of the Consent Decree with the Court. If the Defendants have fully performed their obligations pursuant to this Consent Decree, and if EPA agrees that the performance standards have been achieved, the United States shall not oppose the motion.

FOR THE PLAINTIFF UNITED STATES OF AMERICA:

/s/ _____ Date: _____

MICHAEL D. ROWE,
Attorney
Environment and Natural Resources Division
Environmental Defense Section
United States Department of Justice
Washington, DC 20530

_____ Date: _____

FRED FOREMAN,
United States Attorney, by
JAMES J. KUBIK
Assistant United States Attorney
219 S. Dearborn Street, 15th Floor
Chicago, IL 60604

/s/ Date: 7/20/92

HERBERT H. TATE, JR.
Assistant Administrator for
Enforcement
United States Environmental
Protection Agency
401 M. Street, S.W.
Washington, DC 20460

/s/ Date: 4/22/92

VALDAS V. ADAMKUS
Regional Administrator
United States Environmental
Protection Agency
Region V
230 South Dearborn
Chicago, IL 60604

/s/ Date: April 8, 1992

DOROTHY ATTERMEYER
Office of Regional Counsel
United States Environmental
Protection Agency
Region V
77 West Jackson Boulevard
Third Floor
Chicago, IL 60604

FOR DEFENDANT ROBERT R. KRILICH

/s/ Date: 3/27/92

ROBERT R. KRILICH
Krilich Companies, Inc.
1000 Royce Blvd.
Oakbrook Terrace, IL 60181

FOR DEFENDANT KRILICH COMPANIES, INC.

/s/ Date: 3/27/92

ROBERT R. KRILICH
Krilich Companies, Inc.
1000 Royce Blvd.
Oakbrook Terrace, IL 60181

FOR DEFENDANT RIVERWOODS DEVELOPMENT CORPORATION

/s/ Date: 3/27/92

ROBERT R. KRILICH
Riverwoods Development Corporation
1000 Royce Blvd.
Oakbrook Terrace, IL 60181

FOR DEFENDANT LAKEMOOR COUNTRY CLUB, INC.

/s/ Date: 3/27/92

ROBERT R. KRILICH
Lakemoor Country Club, Inc.
1000 Royce Blvd.
Oakbrook Terrace, IL 60181

FOR DEFENDANT AUSTIN STATE BANK
TRUST NO. 4580

This consent order is executed by Austin State Bank not personally but solely as Trustee under the terms of that certain Trust Agreement dated December 18, 1968 identified as Trust No. 4580 and the exercise of the power and authority conferred upon it as Trustee and it is expressly understood and agreed by the parties hereto, anything herein to the contrary not withstanding, that each and all the undertakings and agreements herein made are made and intended not as personal undertakings of the Trustee or for the purposes of binding the Trustee personally but this Consent Decree is executed and delivered by the Trustee solely in the exercise of the powers conferred upon it as such Trustee and no personal liability or personal responsibility is assumed by or shall at any time be asserted or enforced against such Trustee on account hereof or on account of any undertaking or agreement herein contained, either expressly or implied.

/s/ Date: 5/19/92

FOR DEFENDANT MANUFACTURERS' AFFILIATED TRUST CO. f/k/a AFFILIATED BANK/FRANKLIN PARK f/k/a FIRST STATE BANK & TRUST OF FRANKLIN PARK TRUST NOS. 866 and 867

This consent order is executed by the Manufacturers' Affiliated Trust Co. not personally but solely as Trustee under the terms of that certain Trust Agreement dated July 30, 1982 identified as Trust Nos. 866 and that certain Trust Agreement dated July 30, 1982 identified as Trust No. 867 and the exercise of the power and authority conferred upon it as Trustee and it is expressly understood and agreed by the parties hereto, anything herein to the contrary not withstanding, that each and all the undertakings and agreements herein made are made and intended not as personal undertakings of the Trustee or for the purposes of binding the Trustee personally but this Consent Decree is executed and delivered by the Trustee solely in the exercise of the powers conferred upon it as such Trustee and no personal liability or personal responsibility is assumed by or shall at any time be asserted or enforced against such Trustee on account hereof or on account of any undertaking or agreement herein contained, either expressly or implied.

/s/ _____ Date: March 31, 1992

EXHIBIT LIST FOR CONSENT DECREE

EXHIBIT 1	The Royce Renaissance jurisdictional delineation;
EXHIBIT 2	The Royce Renaissance on-site mitigation site map;
EXHIBIT 3	The Sullivan Lake jurisdictional delineation and on-site mitigation site map;
EXHIBIT 4	The Royce Renaissance Restoration/Mitigation Plan document;
EXHIBIT 5	The Form of the Royce Renaissance restrictive covenant for the on-site mitigation area;
EXHIBIT 6	The Form of the Royce Renaissance restrictive covenant for the on-site mitigation area; and
EXHIBIT 7	The Form of the Sullivan Lake restrictive covenant for the on-site mitigation area.
EXHIBIT 8	Carol Stream prospective enhancement areas.

[Exhibits omitted in printing]

APPENDIX D

EXPERT REPORT OF GARY C. SCHAEFFER, P.E.

I, Gary C. Schaefer, P.E., being first duly sworn, do depose and state as follows:

1. I am a registered professional engineer in Illinois and Wisconsin specializing in water resources engineering and wetland science. I have been with Hey and Associates ("Hey") for over eleven years. For the past three and one-half years, I have been president of Hey. During that time I have supervised and directly participated in hundreds of wetland projects and drainage studies. I have directed the design of numerous large wetland assessment and drainage projects. I also am an expert in hydrology with twenty-five years of experience in this field. I have directly supervised the preparation of numerous water resources investigations for Hey including drainage, hydrology, and floodplain investigations requiring the seal of a professional engineer. I also have participated in water quality investigations for Hey as part of environmental assessments we have led for both public and private clients in Illinois.

2. Prior to joining Hey, I was Director of Natural Resources for the Northeastern Illinois Planning Commission ("NIPC"). In this position I was responsible for the preparation of all of NIPC's water resources projects. These projects included numerous model ordinances and guidebooks for managing water quality, stormwater, and natural areas. I also was the project coordinator for NIPC's U.S. Environmental Protection Agency's ("USEPA") Nationwide Urban Runoff Project, which studied the effectiveness of detention ponds in improving water quality from urban stormwater. I also was a project engineer on

NIPC's Areawide Water Quality Management Plan for Northeastern Illinois.

Investigations

3. Hey personnel recently visited the Royce Renaissance site (the "Site") on two occasions, February 28, 2001 and March 1, 2001. Tom Kehoe, senior wetland scientist, John Tandarich, soils scientist, and I inspected the site. I previously visited the Site on October 9, 1995 and October 12, 1995 in connection with USEPA's Motion to Enforce the Consent Decree.

4. Hey personnel examined the Site and the land between the Site and Salt Creek. This examination included field inspections and a review of 1986, 1988 and 1990 aerial photographs and various sources of data on hydrology, drainage and ecology. We also spoke with staff of the Village of Oakbrook Terrace.

5. In preparing this affidavit, in addition to my direct observations, I reviewed and relied on the following sources: (1) the Wetland Boundary Delineation of the USEPA dated August 10, 1990; (2) the Wetland Delineation and Assessment Report of Environmental S/E ("ES/E") dated March 20, 1990; (3) the Wetland Restoration and Mitigation Summary Document dated April 29, 1992, by ES/E; (4) the Consent Decree ("CD") between Robert R. Krilich, et al. and the United States of America, entered October 30, 1992, No. 92-C-5354; (5) the United States' Motion to Enforce Consent Decree, including the Glatzel and Ehorn declarations and the USEPA documents attached to the Motion; (6) the 1986, 1988 and 1990 aerial photographs of the Site and the downstream watershed to Salt Creek; (7) the Complaint filed by the United States in case 92 C 5354; (8) water resources publications of the U.S.

Geological Survey ("USGS"); (9) topographical data and habitat assessment techniques from DuPage County; (10) discussions with Kim Plencner who works on Site; and (11) discussions with Tom Slowinski.

Site History

6. The Site is located in Oakbrook Terrace, Illinois. It covers approximately 85 acres (although I have not independently verified the acreage). The nearest non-navigable perennial watercourse to the Site is Salt Creek about 1.9 stream miles away. The nearest navigable watercourse is the Des Plaines River below Hoffman Dam about 19.1 stream miles away.

7. The Complaint alleges that in 1988 and 1989 the defendants unlawfully filled wetlands on Site in violation of Section 404 of the Clean Water Act. In 1988, the Corps performed a partial delineation of the Site. In 1990, USEPA supplemented the Corps delineation, identifying nine wetland areas. These nine areas, W1 through W9, were incorporated into the CD. Exhibit 1 to the CD outlines the boundaries of W1 through W9 and notes the areas USEPA alleges were unlawfully filled (4.56 acres out of 14.7 acres of on Site wetlands).

8. As part of my evaluation, I focused on three questions: (1) whether W1 through W9 were navigable in fact; (2) whether there was a natural physical connection between W1 through W9 and a navigable waterway; (3) whether W1 through W9 were "inseparably bound up" or had any effect on the navigable Des Plaines River or nonnavigable Salt Creek.

W1 Through W9 Are Not Navigable in Fact

9. W1 through W9 are not navigable in fact. Since at least 1988, W1 through W9 have been too small and too shallow for use by the public for commercial or transportation purposes. Further, the Corps has not designated these areas as "navigable" and the Site is private property.

10. **W1.** W1 was approximately 4.48 acres in size (CD). W1 was about 2 feet deep in the open water portion (Slowinski) and about 6 inches deep in the wetland portion (ES/E, 1990).

11. **W2.** W2 was approximately 1.71 acres in size (CD). W2 was about 6 inches deep in the wetland portion (ES/E, 1990).

12. **W3.** W3 was approximately 0.11 acres in size (CD). W3 was less than a foot deep (ES/E, 1990).

13. **W4.** W4 was approximately 1.09 acres in size (CD). W4 was about one foot deep in the wetland portion and three feet deep in the ditch (ES/E, 1990). The CD does not allege that the defendants disturbed W4.

14. **W5a.** W5a was approximately 0.40 acres in size (CD). W5a was less than a foot deep (ES/E, 1990).

15. **W5b.** W5b was approximately .03 acres in size (CD). W5b was less than a foot deep (ES/E, 1990).

16. **W6.** W6 was approximately 3.08 acres in size (CD). W6 was about five feet deep. (Slowinski)

17. **W7.** W7 was approximately 0.10 acres in size (CD). W7 was a ditch one to three feet deep. (Slowinski)

18. **W8a.** W8a was approximately 2.89 acres in size (CD). W8a was one to three feet deep. (Slowinski)

19. **W8b.** W8b was approximately .09 acres in size (CD). W8b was about 6 inches deep. (Slowinski)

20. **W9.** W9 was about 0.72 acres in size (CD). W9 was less than a foot deep. (DuPage County, 1991). The CD does not allege that the defendants disturbed W9.

W1 Through W9 Are Isolated

21. Since at least 1986, W1 through W9 have had no natural connection to any navigable waterway. The closest navigable watercourse is 19.1 stream miles away.

22. Since at least 1986, all of the Site's drainage appears to have flowed into a manhole (with an open grate) on the north side of Butterfield Road. This manhole then appears to connect to a manmade, underground, concrete storm sewer system. Many of the wetland areas may not drain from the Site at all. See Exhibit 1.

23. The manmade underground storm sewer system runs 2000 feet toward the east and then flows into a small ditch about 350 feet east of Midwest Road and 700 feet south of Butterfield Road. See Exhibit 2.

24. The ditch joins nonnavigable Salt Creek about 1.5 miles further to the east and Salt Creek joins the Des Plaines River about 16.5 miles further to the southeast. The Des Plaines River flows another 0.66 miles to Hoffman Dam at Riverside. At this point, the Des Plaines River has been declared navigable for purposes of Corps of Engineers' jurisdiction under the Rivers and Harbors Act of 1899. Thus, the Site is approximately 1.9 stream miles from Salt Creek, 18.4 stream miles from where Salt Creek joins the

Des Plaines River and 19.1 stream miles from where the Des Plaines River has been declared "navigable" by the Corps.

25. The Site's drainage is often times hydrologically isolated. At many times during the year, there is no flow in the storm sewer system between the Site and the drainage ditch east of Midwest Road. I also believe that at many times during the year there is no flow between the ditch east of Midwest Road and Salt Creek. Finally, the USGS has measured that portions of Salt Creek may have no flow during dry years.

W1 Through W9 are not Inseparably Bound Up with a Navigable Water

26. In assessing a wetland's impact on navigable waters, the Corps typically reviews the wetland's "functional values." Functional values are the beneficial role that wetlands play for ecology or hydrology.

27. In his declaration, Thomas Glatzel of the USEPA states that wetland functional values include: wildlife habitat, stormwater retention, flood flow attenuation and water purification.

28. We have examined the significance of W1 through W9 on the Des Plaines River and Salt Creek for wildlife habitat, stormwater retention, flood flow attenuation and water purification. None of these factors alter the fact that these waters are isolated.

Habitat

29. Since at least 1988, W1 through W9 have had no measurable effect on the wildlife habitat of the Des Plaines River or Salt Creek.

30. Based on the data we have available for 1990, W1 through W9 did not meet Du Page County's definition of critical wetland habitat near that time. There is also no documentation that W1 through W9 provided habitat for threatened or endangered species in the late 1980s. They currently do not provide habitat for any threatened or endangered species.

31. Further, any habitat function originally provided by W1 through W9 was severely compromised by neighboring development in Oakbrook Terrace during the late 1970s and 1980s.

Stormwater Retention, Flood Flow Attenuation and Water Purification

32. Since at least 1988, with respect to the Des Plaines River and Salt Creek, W1 through W9 have had no measurable effect in terms of stormwater retention, flood flow attenuation and water purification.

33. Approximately 403,000 acres of land contribute water to the Des Plaines River at Hoffman Dam and 93,000 of those acres contribute water to Salt Creek where it meets the Des Plaines. Thus, the mere presence of 14.7 acres of wetlands, let alone 4.56 acres of wetlands (the amount allegedly filled), has no measurable effect on the quality or quantity of these waters. This conclusion is further bolstered by the fact that the Site's drainage must flow through 2000 feet of manmade storm sewers and 1.5 miles of ditch before reaching Salt Creek.

34. In fact, when the Corps of Engineers studied the hydrology of the Des Plaines River and remapped flood risk in the late 1990s, they did not consider these wetlands in their study of either Salt Creek or Des Plaines River flood risk. This

shows that the Corps did not consider W1 through W9 to have any significance regarding flooding on either the Des Plaines River or Salt Creek.

35. Even if all of W1 through W9 were filled (which they were not), they would have no measurable effect on the Des Plaines River or Salt Creek in terms of wildlife habitat, stormwater retention, flood flow attenuation and water purification. Thus, they are not inseparably bound up with these waters.

Conclusion

36. I conclude that since at least 1988, W1 through W9 have not been navigable in fact, have had no natural connection to any navigable waterway, have been hydrologically isolated during significant parts of the year and have had no measurable effect on the Des Plaines River or Salt Creek in terms of wildlife habitat, stormwater retention, flood flow attenuation and water purification.

/s/
Gary C. Schaefer, P.E.

Subscribed and Sworn to before
me, a Notary Public, this 13
day of March, 2001

/s/
NOTARY PUBLIC
[seal illegible]

APPENDIX E

STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1311 provides in pertinent part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1344 provides in pertinent part:

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites.

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1362 provides in pertinent part:

§ 1362. Definitions

* * * * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Supreme Court, U.S.
FILED
JAN 15 2003
OFFICE OF THE CLERK

(2)

No. 02-915

In The
Supreme Court of the United States

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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January 15, 2003 *Counsel of Record for *Amicus Curiae*

19 pp

QUESTION PRESENTED

Amicus curiae will address the following issue presented for review:

Does the federal government have the constitutional and statutory authority to regulate isolated wetlands that lack a surface connection to the nearest stream or nearest navigable body of water?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

IDENTITY AND INTEREST OF *AMICUS CURIAE*.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....4

REASON FOR GRANTING THE PETITION.....9

Guidance Is Needed By This Court To Ensure That the States' Role in Environmental Protection Is Protected 9

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases **Page**

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1980).....9

Headwaters, Inc., v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001).....7

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001).....7

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).....6

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001).....*passim*

United States v. Interstate General Co., 39 Fed. Appx. 870 (4th Cir. July 2, 2002).....6

United States v. Krilich, 303 F.3d 784 (7th Cir. 2002).....5

United States v. Lamplight Equestrian Center, 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. Mar. 8, 2002).....7

United States v Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002).....6

United States v. RMG Corp., 222 F. Supp. 2d 780 (E.D. Va. 2002).....7

United States v. Rueth Developers, 189 F. Supp. 2d 874 (N.D. Ind. 2002).....7

Statutes, Regulations, and Rules

13 U.S.C. § 1344.....4

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Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1 (1999).....10, 11, 12, 13

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Debra Alise Spungin, Note, *Troubled Waters: Florida's Isolated Wetlands in the Aftermath of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 26 NOVA L. REV. 371 (2001).....11

Defenders of Property Rights, *amicus curiae,* submits this brief in support of petitioner.[1] See Rule 37.3 of the Rules of this Court. Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Solid Waste Agency of Northern Cook County v. United States*

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no one other than *amicus curiae*

Army Corps of Engineers, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

In 1992, Petitioners Robert Krilich et al. and the Respondent United States Environmental Protection Agency entered into a Consent Decree to settle an enforcement action that respondent had brought against petitioners alleging an unlawful discharge of fill material without a permit into an isolated wetland. As part of this settlement, petitioners agreed to perform certain mitigation activities, including

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contributed financially to the preparation of this brief.

removal of spoil piles, installation of flood control structures, and creation of an off-site replacement wetland. In 1995, respondent alleged that petitioners failed to create this replacement wetland by the deadline established in the Consent Decree. The district court imposed civil penalties on Krilich for his failure to perform this remediation, *see United States v. Krilich*, 948 F. Supp. 719, 728 (N.D. Ill. 1996).

Petitioners moved to vacate the district court's original judgment in 1998, arguing that the district court lacked subject matter jurisdiction because the wetlands were "isolated intrastate wetlands" beyond the limits of the government's commerce power to regulate. The district court and the Seventh Circuit Court of Appeals rejected Krilich's argument. *See United States v. Krilich*, 1999 U.S. Dist. LEXIS 4191 (N.D. Ill. Mar. 24, 1999), *aff'd*, 209 F.3d 968 (7th Cir. 2000).

In 2001, this Court issued the decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001),

holding that the Congressional intent of the Clean Water Act (CWA) forbade the Corps from asserting regulatory jurisdiction under Section 404(a) of the Act (13 U.S.C. § 1344 (a)) over intrastate, isolated wetlands based upon the Migratory Bird Rule. *See SWANCC*, 531 U.S. at 174. Petitioners moved to vacate the Consent Decree in light of *SWANCC*, arguing that the waters affected by the Consent Decree were not subject to the EPA's authority under the CWA. The district court and the Seventh Circuit both denied petitioners' motion. *See United States v. Krilich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001), *aff'd*, 303 F.3d 784 (7th Cir. 2002). Petitioners now seek review from this Court.

SUMMARY OF ARGUMENT

In *SWANCC*, this Court struck down the Corps' assertion of CWA jurisdiction over isolated, intrastate, non-navigable wetlands, finding "nothing approaching a clear statement from Congress that it intended Section 404(a) [of the CWA] to reach" such wetlands. *See SWANCC*, 531 U.S.

at 174. The Corps had based its jurisdiction on the fact that the wetlands at issue served as a habitat for migratory birds. This Court held that "permitting [the Corps] to claim . . . jurisdiction over [such wetlands] falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *See id.* This Court explicitly avoided the "significant constitutional and federalism questions raised by [the Corps'] interpretation [of its own authority under the CWA]." *See id.*

Lower courts are uncertain as to what *SWANCC* means for the CWA authority of the federal government over isolated wetlands. The court below and other lower courts interpreted *SWANCC* narrowly, permitting the federal government to assert regulatory authority over non-navigable, isolated wetlands with no surface connection to "waters of the United States" as long as it does not explicitly ground its authority in the Migratory Bird Rule. *See United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002) ("[Krilich]

argues that, in *SWANCC*, the Supreme Court removed from the Corps' regulatory authority all waters that are not adjacent to bodies of open water . . . But the precise holding of *SWANCC* was not so broad"); *see also United States v. Interstate General Co.*, 39 Fed. Appx. 870 (4th Cir. July 2, 2002). Such a narrow construction of *SWANCC* leaves the federal government ample room to assert jurisdiction over isolated wetlands, ignoring this Court's concern for the traditional role of states in land and water use regulation.

The Fifth Circuit and some district courts, in keeping with *SWANCC*'s proper regard for state authority over land and water use, have interpreted the decision to create a bright-line rule limiting federal CWA authority to waters that "are actually navigable or . . . adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 265, 268-271 (5th Cir. 2001). *See also United States v Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (excluding wetlands "not directly adjacent to navigable waters" from the scope of the federal government's CWA

jurisdiction); *United States v. RMG Corp.*, 222 F. Supp. 2d 780, 788-89 (E.D. Va. 2002) (wetlands not adjacent to closest navigable waterway lay outside federal government's jurisdictional reach under CWA).

The Ninth Circuit and various district courts chart a course distinct from these two approaches, relying instead on a vague "effects" test that asks whether the wetland in question has a significant connection to, or effect upon, a navigable body of water. *See Headwaters, Inc., v. Talent Irrigation District,* 243 F.3d 526 (9th Cir. 2001) (certain irrigation canals were not "isolated" under *SWANCC* because introduction of pollutants into canals had adverse effect on waters of the United States). *See also United States v. Lamplight Equestrian Center*, 2002 U.S. Dist. LEXIS 3694, at *6 (N.D. Ill. Mar. 8, 2002) (there must be "a significant nexus" between the isolated wetlands and a navigable water to sustain federal CWA jurisdiction over the former); *United States v. Rueth Developers,* 189 F. Supp. 2d 874, 877-78 (N.D. Ind. 2002) (same); *Idaho Rural Council v. Bosma*, 143

F. Supp. 2d 1169, 1179 (D. Idaho 2001) ("sufficient [connection]" between isolated wetland and navigable water rendered the isolated wetland subject to federal CWA jurisdiction). This interpretation of *SWANCC*, like that of the court below, also leaves the federal government ample room to assert CWA jurisdiction over isolated wetlands, disregarding the role of the states in regulating land and water use.

The uncertain bounds of federal jurisdiction over isolated, intrastate wetlands impose a burden on state and local governments, who retain primary authority over land and water use. State and local governments cannot pick up the slack for wetlands protection without knowing the limits of what the EPA and Corps can do. Property owners would also benefit from a clearer division of regulatory authority over isolated wetlands so they do not face redundant or inconsistent restrictions on private economic activity they conduct on their property.

REASON FOR GRANTING THE PETITION

Guidance Is Needed By This Court To Ensure That the States' Role in Environmental Protection Is Protected.

This Court has declared that land use regulation, including wetland regulation, is traditionally a function of state and local governments. *See Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742, 768 n. 30 (1980) ("regulation of land use is perhaps the quintessential state activity"); *see also SWANCC*, 531 U.S. at 174 ("Regulation of land use [is] a function traditionally performed by local governments") (quoting *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994)). The court below read no meaningful limits on the federal government's CWA authority over isolated wetlands, ignoring the primary role that states and local governments play in regulating land and water use.

Although many critics express concerns about the competency of states to protect wetlands, many commentators argue that states are in fact better suited to this

task than the federal government. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 23-24 (1999) ("The ecological value of a wetland is largely a function of its characteristics and its location. This is . . . why it can be argued that state governments are better situated to conserve wetlands than federal agencies"). A clearer delineation of the limits of the federal government's CWA authority over wetlands will encourage states to further develop this competency.

Fifteen states have already enacted comprehensive wetland protection legislative schemes in order to fill the jurisdictional gap left by *SWANCC*. *See, e.g.*, Adler, *supra*, at 49; Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands* (Association of State Wetland Managers, Berne, NY) (May 31, 2001), <http://www.aswm.org/fwp/swancc/aswm-int.pdf>. Some state wetland programs are broad in reach, regulating

virtually all wetlands within the state (New Hampshire, New Jersey, Maine, and Pennsylvania). *See* Kusler, *supra*.

For example, Florida has enacted substantial legislation to protect isolated wetlands. *See* Debra Alise Spungin, Note, *Troubled Waters: Florida's Isolated Wetlands in the Aftermath of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 26 NOVA L. REV. 371, 383-84 (2001) ("Florida affords considerable protection to its isolated wetlands . . . [T]he statutory definition [of 'wetland'] is thus unique to Florida's local characteristics and inclusive of isolated wetlands").

State efforts to protect wetlands have borne fruit, demonstrating their competitive advantage in protecting wetlands. Under Virginia's wetland protection program begun in 1972, "alteration of wetlands dropped dramatically . . . from over 600 to 20 acres per year." *See* Adler, *supra*, at 51 (quoting Norman E. Larsen, *Wetlands Protection in Virginia—The Local Option Approach*, in WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES 251

(1985)). Maryland has had similar success with its wetland regulatory scheme, having reduced its annual wetlands losses significantly and "prevented far more wetland destruction than would occur under Section 404 alone." *See id.* (quoting Stephen R. Rubin, Note, *An Analysis of Nontidal Wetland Regulation in Maryland*, 16 VA. ENVTL. L.J. 459, 495-96 (1997)).

States like Maryland and Virginia cannot further improve their already successful wetland protection programs without knowing the limits of the federal government's authority to regulate wetlands. Only by knowing where the federal government's job ends can states know where their own jobs begin in the realm of wetland regulation. Once clear limits are established, more and better wetland protection regulatory schemes can be expected from the states.

Property owners would also benefit from this Court's guidance on these issues. Isolated wetlands account for almost two million acres out of the 100 million acres of

wetlands in the United States. *See* Adler, *supra*, at 40. Most wetland regulations, both state and federal, restrict land use, increasing the costs of corporations of siting and modifying facilities. *See id.* at 41. Without a clear demarcation of jurisdiction, state and federal authorities can cripple private economic activity on isolated wetlands by simultaneously imposing overlapping and redundant regulations. A clear dividing line would allow state and federal authorities to better divide regulatory responsibilities over isolated wetlands, while also reducing the costs of property use to property owners.

Accordingly, *amicus curiae* urges this Court to grant review of this case to determine if the court below erred in concluding that *SWANCC* did not affect the Corps' jurisdictional boundaries.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 7 2003
OFFICE OF THE CLERK

(3)

No. 02-915

In the

Supreme Court of the United States

ROBERT R. KRILICH, KRILICH COMPANIES, INC., RIVERWOODS DEVELOPMENT CORP., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to decisions of other courts of appeals and this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* that the federal government has the statutory and constitutional authority to regulate "non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water."

2. Whether a consent decree between private citizens and an agency of the federal government is subject to rescission as void ab initio where the federal government never had statutory or constitutional authority to regulate the subject matter of the decree.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW HAS MISINTERPRETED THE CLEAN WATER ACT ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT CARRIES SIGNIFICANT CONSTITUTIONAL IMPLICATIONS 4

A. The Lower Court Decision Raises Serious Federalism Questions 4

B. The Lower Court Decision Conflicts with This Court's SWANCC Decision 6

C. The Lower Court Decision Raises Serious Commerce Clause Questions 9

II. THE PETITION SHOULD BE GRANTED BECAUSE THE FEDERAL GOVERNMENT REFUSES TO FOLLOW THE *SWANCC* DECISION AND THERE IS A SUBSTANTIAL CONFLICT AMONG THE LOWER COURTS 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 (1988) 10

Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167 (2000) 1

Hanousek v. United States, 528 U.S. 1102 (2000) 1

Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency, 961 F.2d 1310 (7th Cir.) *vacated*, 975 F.2d 1554 (7th Cir. 1992) 2

National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) 4

Rice v. Harken Exploration Company, 250 F.3d 264 (5th Cir. 2001) 14-15

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 1, 2, 4, 6-10, 14, 16

United States v. Krilich, 303 F.3d 784 (7th Cir. 2002) 3

United States v. Lopez, 514 U.S. 549 (1995) 5, 10, 13

United States v. Morrison, 529 U.S. 598 (2000) 10-13

United States v. Needham, 2002 U.S. Dist. LEXIS 23914 (W.D. La. Jan. 22, 2002) 15

TABLE OF AUTHORITIES—Continued

Page

United States v. Rapanos,
190 F. Supp. 2d 1011 (E.D. Mich. 2002) 15

United States v. RGM Corp.,
222 F. Supp. 2d 780 (E.D. Va. 2000) 14-15

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 1, 6-8

United States v. Wilson,
133 F.3d 251 (4th Cir. 1997) 4

Statutes

33 U.S.C. § 1251 5

42 U.S.C. § 13981 11

Rules

Supreme Ct. 37.2 1

37.6 1

Federal Regulations

68 Fed. Reg. 1991 (Jan. 15, 2003) 14-16

Miscellaneous

Adler, Jonathan H., *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999) 5

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated to litigate important matters of public interest. PLF has thousands of supporters nationwide and advocates a balanced approach to dealing with public interest issues. PLF supports the concept of limited government and the "rule-of-law" and believes the environment must be protected consistent with economic and other needs of society. PLF's Board of Trustees has authorized amicus participation in this case.

PLF has participated as amicus curiae in numerous cases involving interpretation of the Clean Water Act (CWA). For example, PLF participated as amicus curiae in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Hanousek v. United States*, 528 U.S. 1102 (2000); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). PLF is familiar with the issues in this case and believes its briefing on those issues will add a necessary viewpoint to the questions presented.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

In 1992, Robert Krilich was sued by the Environmental Protection Agency (EPA) for filling wetlands without a permit—a Clean Water Act violation. While the suit was pending, the Seventh Circuit decided *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 961 F.2d 1310 (7th Cir.) ("*Hoffman Homes I*"), *vacated*, 975 F.2d 1554 (7th Cir. 1992), in which the court determined that EPA had no authority under the Clean Water Act to regulate "isolated" wetlands, or wetlands that have no connection to open waters. After that decision, Krilich and EPA entered into a consent decree disposing of their case. They agreed, in accordance with *Hoffman Homes I*, that certain wetlands on Krilich's Illinois property were not subject to regulation but that Krilich would need to mitigate the impacts of filling other wetlands on his property that were remote from open waters. These wetlands had "no natural connection to any navigable waterway" and were "located 19.1 stream miles away from the nearest navigable body of water." Petition at 3.

In 2001, this Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (*SWANCC*). In that case, this Court determined that the EPA and the Corps have no statutory authority under the Clean Water Act to regulate nonadjacent wetlands, or wetlands that do not abut a navigable waterway. *See Id.* at 168. It did so by invalidating an administrative policy, called the "Migratory Bird Rule," that purported to authorize these agencies to regulate fill into any waters that could be used by migratory birds. Subsequently, Krilich challenged the consent decree arguing it was void because it required him to mitigate for impacts to nonadjacent wetlands over which this Court had determined the government had no authority. However, the Seventh Circuit refused to rescind the consent decree because it believed *SWANCC* only invalidated the "Migratory Bird Rule" and did not limit the agencies' ability

to regulate nonadjacent wetlands. *United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002).

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be granted because the lower court misinterpreted the CWA and upheld the EPA's assertion of authority over nonnavigable, intrastate wetlands that are not immediately adjacent to a navigable waterway. That decision is contrary to *SWANCC* wherein this Court determined that the CWA does not authorize federal regulation of wetlands or other waters that are not navigable or that do not abut a navigable water body. Additionally, federal regulation of nonadjacent wetlands suffers from the same constitutional defects as the "Migratory Bird Rule" invalidated in *SWANCC*. But the Government itself provides one of the most persuasive arguments in support of review. The government acknowledges that many lower courts have rejected its narrow reading of *SWANCC*, adopted by the Seventh Circuit in this case. Nevertheless, the government is seeking public input on its CWA jurisdiction based on that reading.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW HAS MISINTERPRETED THE CLEAN WATER ACT ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT CARRIES SIGNIFICANT CONSTITUTIONAL IMPLICATIONS

A. The Lower Court Decision Raises Serious Federalism Questions

The decision below raises a red flag; federal intrusion into state affairs. According to this Court, the concern raised by pushing the envelope on federal authority is heightened "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Simply stated, this Court has recognized that permitting the EPA and the Corps to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

This is not a matter of speculation. Reports of heavy-handed enforcement of section 404 of the CWA are legion. *See, e.g., National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), and *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). By means of the section 404 permit process, the federal government assumes actual veto power over literally tens of thousands of land use projects nationwide every year, thereby usurping the traditional powers of state and local governments. A more significant shift in the federal-state framework would be hard to conceive. By one measure, 75% of the approximately 100,000,000 acres of the nation's wetlands are on private land subject to state and local control. *See*

Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 26, 52 (1999). Clearly, the Seventh Circuit decision in this case raises serious concerns about federal intrusion into state affairs. If the EPA and the Corps can regulate any wetland, no matter how attenuated or remote the connection to navigable waters, the States will have lost their sovereign power. This cannot be the law.

This Court has recognized that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the States which are numerous and indefinite. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). This limitation on federal authority was necessary, this Court has emphasized, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-55. It follows that the government cannot shift this balance of power by the simple expedient of asserting authority over nonadjacent, nonnavigable, intrastate waters like those at issue here.

An explicit objective of Congress in promulgating the CWA was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But the regulation of nonadjacent waters at issue in *SWANCC* was inconsistent with that objective. So is the regulation of nonadjacent wetlands in this case. The ability of the EPA and the Corps to condition or prohibit the filling of nonnavigable, intrastate wetlands that do not abut a navigable water cannot coexist with the State's "primary responsibilities and rights . . . to plan the development and use . . . of land and water resources." *Id.* The regulation of such waters does not "recognize, preserve, and protect" the power of the States. Rather, it diminishes that power.

B. The Lower Court Decision Conflicts with This Court's SWANCC Decision

Until the *SWANCC* decision, many courts and the federal government relied on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to justify EPA and Corps regulation of virtually all wetlands without regard to their connection to "navigable waters." Even now, these agencies doggedly assert that *SWANCC* had a negligible effect on *Riverside Bayview* and that its wetland jurisdiction has not been altered beyond invalidation of the "Migratory Bird Rule." But this is based on a misunderstanding of both cases.

Riverside Bayview Homes, Inc., owned 80 acres of low-lying marshland near the shores of Lake St. Clair in Macomb County, Michigan. When Riverside Bayview placed fill material on the property without a permit, the Corps asserted jurisdiction over the property as an "adjacent wetland" and obtained an injunction from the district court. That court found that the marshland was "adjacent" to a navigable water because the area was characterized by saturated soil conditions and wetland vegetation that "extended . . . to Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 131.

That side-by-side connection between the marshland and the open water body formed the basis for this Court's decision in *Riverside Bayview*. This Court expressly held that Riverside Bayview must obtain a permit "*[b]ecause* respondent's property is part of a wetland that *actually abuts* on a navigable waterway." *Id.* at 135 (emphasis added). But notwithstanding this clear holding, other language in *Riverside Bayview* was interpreted by the EPA and the Corps to extend the reach of the CWA to nonnavigable waters generally.

As this Court noted: "In *Riverside Bayview Homes*, we recognized that Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that

term.'" *SWANCC*, 531 U.S. at 171 (quoting *Riverside Bayview*, 474 U.S. at 133). The EPA and the Corps evidently took that language as carte blanche and used it to justify regulation of even wholly isolated waters. But in *SWANCC*, this Court countered that interpretation by noting that the language of *Riverside Bayview* does not confer federal jurisdiction over *all* nonnavigable wetlands:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172.

This language sets forth the scope of the CWA and clearly limits *Riverside Bayview*. As noted above, in *Riverside Bayview*, this Court held that the term "navigable" was of limited effect. But in *SWANCC*, this Court declared the limits of that effect. As this language indicates, under *SWANCC*, "navigable" waters extend only (1) to wetlands adjacent to open waters, and (2) to other waters that were or had been navigable in fact or which could reasonably be so made.

Other language in *SWANCC* further limits both this Court's decision in *Riverside Bayview* and the word "adjacent." This Court stated: "In *United States v. Riverside Bayview Homes,*

Inc., we held that the Corps had § 404(a) jurisdiction over wetlands that *actually abutted* on a navigable waterway." *SWANCC*, 531 U.S. at 167 (emphasis added; citation omitted). But this Court did not stop there in its explication of *Riverside Bayview*. This Court offered additional clarification in *SWANCC* regarding the scope of agency jurisdiction over adjacent wetlands: "We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *SWANCC*, 531 U.S. at 169 (quoting *Riverside Bayview*, 474 U.S. at 134). But, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167.

After discussing what this Court **had** determined in *Riverside Bayview*—that the Corps (and therefore the EPA) could regulate certain wetlands that abut a "navigable waterway"—this Court pointed out what it **had not** determined in *Riverside Bayview*: "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not* adjacent to bodies of open water.'" *Id.* at 167 (emphasis added).

It follows from that statement that *Riverside Bayview* does not support the EPA and the Corps' regulation of the nonnavigable, intrastate wetlands in this case that lie more than nineteen miles from the nearest navigable waters. Nor does *SWANCC*. In *SWANCC* this Court did express an opinion on the question left open in *Riverside Bayview* and concluded: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Id.* at 168.

Therefore, jurisdictional wetlands must actually abut a navigable waterway and be inseparably bound up and have a

significant nexus with navigable waters. As a result, wetlands that are not immediately adjacent to navigable waters are not subject to federal regulation under the CWA.

The wetlands at issue in this case do not meet this standard. They do not abut any navigable waterway:

> The nearest non-navigable water body, Salt Creek, is located 1.9 stream miles away from the property, and the nearest navigable water, the Des Plaines River at Hoffman Dam, is located 19.1 stream miles away. In order for any runoff from the property to reach the Des Plaines River at Hoffman Dam, it must travel into a manhole with an open grate, which connects to a "manmade, underground, concrete storm sewer system," which runs 2000 feet east and then flows into a small ditch that joins non-navigable Salt Creek about 1.5 miles further east. Salt Creek then joins the Des Plaines River approximately 16.5 miles to the Southeast.

Petition at 1-2.

Clearly, these wetlands are not adjacent to a navigable waterway. Nor are they "inseparably bound up" with any navigable waters or have a "significant nexus" with such waters.

C. The Lower Court Decision Raises Serious Commerce Clause Questions

In *SWANCC*, the Corps argued the CWA granted it authority to regulate "nonnavigable, isolated, intrastate waters. 531 U.S. at 172. However, this Court determined that the Corps' interpretation of the statute invoked "the outer limits of Congress' power" and could not be sustained. *Id.*

Thus "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such

construction is plainly contrary to the intent of Congress." *Id.* at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988)).

The constitutional problem was the Corps' claim that the filling of "nonnavigable, isolated, intrastate" waters somehow "substantially affected" interstate commerce and was, therefore, authorized under Congress' commerce power. This Court was clearly skeptical of this argument and noted that the commerce connection asserted by the Corps was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173. To drive the point home, this Court referenced its Commerce Clause decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549, stating: "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173.

Since the regulation of nonnavigable, isolated, intrastate waters implied unlimited administrative authority in the federal government, this Court was unwilling to read such authority into the CWA. But the lower court's determination in this case that the EPA has authority over waters that are not adjacent to, or abut, a navigable waterway implies the same limitless power as the "Migratory Bird Rule" and is likewise invalid. A closer look at this Court's Commerce Clause cases makes the point.

Morrison involved a Commerce Clause challenge to 42 U.S.C. § 13981. That statute provided a federal civil remedy for the victims of gender-motivated crimes. Building on *Lopez*, this Court ruled that the statute could not be sustained under the Commerce Clause.

In *Morrison,* this Court affirmed that every law enacted by Congress must be based on a power enumerated in the

Constitution. *Morrison*, 529 U.S. at 607. Although Congress has been given wide latitude under the Commerce Clause, this Court said the modern court has recognized limits to that power. *Id.* at 608. Since 42 U.S.C. § 13981 was focused on "gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)," this Court determined the proper inquiry was whether gender-motivated crime substantially affected interstate commerce. *Morrison*, 529 U.S. at 609.

This Court adopted *Lopez* as the proper framework for this inquiry and observed that central to the *Lopez* decision was the noneconomic nature of the statute. *Id.* at 610. But to emphasize the point, this Court stated:

> *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611.

This Court also observed that in *Lopez* there was no jurisdictional element establishing a case-by-case connection to interstate commerce and that the *Lopez* decision rested in part on the fact that the "link between gun possession and a substantial effect on interstate commerce was attenuated." *Id.* at 612.

With these principles underlying its Commerce Clause jurisprudence, this Court found resolution of the gender-motivated crime statute clear: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. This Court, therefore, challenged the

government's arguments that all gender-motivated crime, a noneconomic endeavor, may be combined to show a substantial effect on interstate commerce. These arguments, this Court stated, are "substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* at 615.

Thus, this Court held:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Id. at 617-18.

The basis for this Court's recent rulings is clear: The Commerce Clause power has limits; it is not like the police power retained by the States.

For this reason, this Court has closely scrutinized Commerce Clause enactments. The framework adopted by this Court to analyze these enactments for substantial effects on interstate commerce is consistent and straightforward. In *Lopez* and *Morrison*, this Court asked: (1) if the statute purports to regulate an economic activity; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; and (3) if the regulation intrudes on areas of traditional state concern.

Under this framework, the regulation of the filling of nonnavigable, intrastate wetlands that do not abut a navigable waterway utterly fails as a valid exercise of the Commerce Clause power. First, the filling of such waters is not inherently commercial and, like the mere possession of a gun or domestic violence, on its face has nothing to do with commerce or any

sort of economic activity. Second, the government's regulation of such waters is not based on a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce. And third, the regulation of the filling of such waters intrudes on the sovereign power of the state to control local land and water use.

Aside from these considerations, this Court weighs a final factor; that is, whether the basis for the regulation has any logical stopping point. *See Lopez*, 514 U.S. at 564-67. A Commerce Clause enactment that relies on combining attenuated economic impacts and unduly expands the reach of Congress will not be sustained. *See Morrison*, 529 U.S. at 617-18. The filling of nonadjacent, nonnavigable, intrastate wetlands is a case in point.

By its own terms, the mere placement of dredged or fill material into shallow and ephemeral waters has no relation to economic activity. Nor has the government shown in this case that the filling of Krilich's wetlands had any measurable affect whatsoever on the navigable waterway lying more than nineteen miles away. To the contrary, Petitioners have provided uncontroverted evidence that the filling of wetlands on Krilich's property "would have no measurable effect" on the nearest navigable or nonnavigable water "in terms of wildlife habitat, stormwater retention, flood flow attenuation and water purification even if they were *completely* filled." Petition at 3.

If Congress can regulate under the Commerce Clause wholly intrastate activity that has nothing to do with commerce or any other economic enterprise, there would be no activity that Congress is without power to regulate.

The only way to avoid the constitutional conflicts raised by the EPA's regulation of the nonadjacent wetlands in this case, and upheld by the court below, is to limit the scope of the CWA to navigable waters, or those nonnavigable waters that are directly adjacent to, or abut, a navigable water, as this Court

sought to do in *SWANCC*. To clarify its ruling in *SWANCC*, this Court should grant the petition.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE FEDERAL GOVERNMENT REFUSES TO FOLLOW THE *SWANCC* DECISION AND THERE IS A SUBSTANTIAL CONFLICT AMONG THE LOWER COURTS

Since the *SWANCC* decision, over twenty courts have considered the federal government's jurisdiction under the CWA. *See* 68 Fed. Reg. 1991, 1996-97 (Jan. 15, 2003). In these cases, the EPA and the Corps have argued that *SWANCC* merely invalidated the "Migratory Bird Rule" and does not prohibit the government from regulating nonnavigable, intrastate waters that do not abut a navigable waterway, such as the wetlands in this case. More precisely, they have argued that they have CWA jurisdiction over any water that has any surface hydrological connection to a navigable water, or even to a tributary to a navigable water. *See, e.g., United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2000).

But this position directly conflicts with this Court's finding in *SWANCC* that the CWA does not extend federal authority over wetlands and other waters that are not navigable or immediately adjacent to navigable waters: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *SWANCC*, 531 U.S. at 168.

This position also conflicts with several appellate and district court decisions that have construed *SWANCC*. *Rice v. Harken Exploration Company*, 250 F.3d 264 (5th Cir. 2001), is a prime example. Although *Harken* did not involve the CWA, the Fifth Circuit relied on *SWANCC* in its interpretation of the Oil Pollution Act concluding "it appears that a body of water is

subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d at 269. The government acknowledges that this decision implies that the Fifth Circuit "might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water." 68 Fed. Reg. 1991, 1997. Some district courts that have relied on a similar analysis of *SWANCC* include *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (*appeal pending*) ("the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property."); *United States v. Needham*, 2002 U.S. Dist. LEXIS 23914 (W.D. La. Jan. 22, 2002) (*appeal pending*) (wetlands and tributaries that are not contiguous to navigable waters are not jurisdictional); and *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002) (*appeal pending*) (nonadjacent wetlands are not jurisdictional).

The EPA and the Corps recognize that the lower courts have not universally supported their interpretation of *SWANCC* or the CWA upheld in this case:

> Several federal district and appellate courts have addressed the effect of *SWANCC* on CWA jurisdiction, and the case law on the precise scope of federal CWA jurisdiction in light of *SWANCC* is still developing. While a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case.

68 Fed. Reg. 1991, 1996.

But notwithstanding that acknowledgment, on January 15, 2003, the EPA and the Corps issued an *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory*

Definition of "Waters of the United States." 68 Fed. Reg. 1991. The purpose of that notice is purportedly to solicit public input on the "the implications of the *SWANCC* decision for jurisdictional decisions under the CWA." According to the notice, *SWANCC* merely eliminates federal CWA jurisdiction over isolated, intrastate, nonnavigable waters, "where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations." *Id.* at 1993. As demonstrated above, this is an unduly narrow reading of the *SWANCC* decision.

The agencies do begrudgingly admit, however, that "*SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on other factors listed in the "Migratory Bird Rule" or the other rationales of 33 CFR 328.3(a)(3)(i)-(iii)." 68 Fed. Reg. 1991, 1993. But the agencies go no further. They request public input on the following jurisdictional question:

> Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

68 Fed. Reg. 1991, 1994.

But this question addresses only isolated waters, or waters that have no hydrological connection to a navigable water body, whereas SWANCC addressed and terminated federal jurisdiction over wetlands or other waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168.

Thus, in addition to the split among the appellate and district courts over CWA jurisdiction, the government is now seeking clarification of its authority based on an understanding of *SWANCC* that many courts have already rejected. Therefore, this Court should grant the petition for certiorari.

CONCLUSION

The wetlands on Krilich's property are more than nineteen stream miles from the nearest navigable water body and connected only by means of intermittent, manmade conveyances, including a manhole and storm sewer system. Federal regulation of such wetlands is inconsistent with the CWA and *SWANCC* and raises significant constitutional concerns. Moreover, the government acknowledges that there is a substantial conflict among the lower courts.

For these reasons, the Petition for Writ of Certiorari should be granted.

DATED: February, 2003.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 12 2003

No. 02-915

In the Supreme Court of the United States

ROBERT R. KRILICH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the private parties to a consent decree, entered in 1992 to settle a civil enforcement action for the alleged filling of wetlands without a permit in violation of the Clean Water Act (CWA), are entitled to reopen the decree in light of this Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Community Ass'n for Restoration of the Env't v. *Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002)	15
Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)	15
Hoffman Homes, Inc. v. *Administrator, United States Envtl. Prot. Agency*:	
961 F.2d 1310 (7th Cir. 1992)	5
975 F.2d 1554 (7th Cir. 1992)	5
999 F.2d 256 (7th Cir. 1993)	5, 6
New Hampshire v. *Maine*, 532 U.S. 742 (2001)	12
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	11
Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001)	14, 15
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)	10, 11
Solid Waste Agency of No. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)	3
United States v. *Interstate Gen. Co., L.P.*, 39 Fed. Appx. 870 (4th Cir. 2002)	13

Cases—Continued: Page

United States v. *Krilich*:
126 F.3d 1035 (7th Cir. 1997) 6
209 F.3d 968 (7th Cir.), cert. denied, 531 U.S. 992 (2000) 8, 12
948 F. Supp. 719 (N.D. Ill. 1996) 6, 13
No. 92 C 5354, 1999 WL 182333 (N.D. Ill. Mar. 25, 1999) 7
United States v. *Lopez*, 514 U.S. 549 (1995) 7
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 3
United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 7, 13

Constitution, statutes, regulations and rules:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 7
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1251(a) 2
33 U.S.C. 1251(a)(2) 2
33 U.S.C. 1311(a) 2
33 U.S.C. 1344 (§ 404) 2, 3, 13, 14
33 U.S.C. 1344(b) 2
33 U.S.C. 1344(c) 2
33 U.S.C. 1362(7) 2
33 U.S.C. 1362(12)(A) 2
33 C.F.R.:
Section 328.3(a) 2
Section 328.3(a)(1) 2
Section 328.3(a)(2) 2
Section 328.3(a)(3) 2
Section 328.3(a)(5) 2
Section 328.3(a)(7) 2
40 C.F.R.:
Section 230.3(s) 2
Section 230.3(s)(1) 2
Section 230.3(s)(2) 2
Section 230.3(s)(3) 3

Regulations and rules—Continued: Page

Section 230.3(s)(5) 2
Section 230.3(s)(7) 2
Fed. R. Civ. P.:
Rule 60(b) 11
Rule 60(b)(4) 7, 8
Rule 60(b)(5) 7, 9, 10, 11, 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 303 F.3d 784. The opinion of the district court (Pet. App. 17a-33a) is reported at 152 F. Supp. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2002. The petition for a writ of certiorari was filed on December 9, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act (Clean Water Act or CWA) in 1972 "to restore and maintain the chemical, physical and biologi-

cal integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the primary goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The Act provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. The Corps and the Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c). The two agencies have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); interstate waters, including interstate wetlands, 33 C.F.R. 328.3(a)(2), 40 C.F.R. 230.3(s)(2); the "tributaries" of interstate or traditional navigable waters, 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to any of the above categories of waters, 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7). In addition, the regulatory definition of "waters of the United States" encompasses "[a]ll other waters * * * the use, degradation, or destruc-

tion of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3), 40 C.F.R. 230.3(s)(3).

This Court has construed the scope of the geographic reach of the CWA on two occasions. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985), the Court concluded that the "Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'" In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that the Corps could not properly exercise regulatory authority over a series of isolated, intrastate, nonnavigable ponds, based on their use as habitat for migratory birds. *Id.* at 174.

2. a. On August 7, 1992, the United States filed an enforcement action under the CWA in federal district court, alleging that petitioners had unlawfully discharged fill material into wetlands without obtaining a Section 404 permit. Pet. App. 2a. The parties subsequently lodged a proposed consent decree with the district court. In October 1992, the district court granted the parties' joint motion to enter the consent decree (with certain minor amendments not relevant here) and retained jurisdiction over the case pursuant to the terms of the decree. See *id.* at 4a-5a. *Inter alia*, the decree required petitioners to undertake remediation and mitigation activities, including creation of replacement wetlands, and to pay fines for the prior filling of wetlands. *Id.* at 4a.

The consent decree specifically reflected the parties' agreement as to which wetland areas were properly

regarded as "waters of the United States" within the meaning of the CWA. The decree stated:

V. WATERS OF THE UNITED STATES

17. For purposes of this Consent Decree, *the parties shall treat wetlands and open water areas depicted on Exhibit 1*, together with the new wetland and open water area created pursuant to Part VII (injunctive relief) and depicted on Exhibit 2, *as waters of the United States* located on the Royce Renaissance Property.

* * * * *

20. The boundaries depicted in Exhibit[] 1 * * * *shall bind the parties for the life of this Consent Decree* unless and until a new Corps or EPA delineation is made pursuant to the final version of a revised wetland delineation manual.[1] * * * *

20A. The Defendants shall continue to treat wetland and open water areas depicted on Exhibit 1 as waters of the United States until the mandate issues in Hoffman Homes, Inc. v. EPA, No. 90-3810 (7th Cir. April 20, 1992) and until proceedings related to any appeal, petition for certiorari, or remand are completed. Following completion of these proceedings, *unless pertinent portions of the Seventh Circuit's April 20, 1992 decision are reversed, Exhibit 1 areas W2A, W2B, W3, W5B and W9 shall be excluded from the obligations imposed in Paragraph 17.*

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[1] Neither agency has issued a revised wetlands delineation manual.

Pet. App. 38a-39a (emphases added). "Thus, the parties expressly excluded some waters on the defendant's property and agreed to treat the rest of the waters as 'waters of the United States.'" *Id.* at 4a.

b. In *Hoffman Homes, Inc.* v. *Administrator, United States Environmental Protection Agency*, 961 F.2d 1310 (7th Cir. 1992) (*Hoffman Homes I*), the court of appeals held that intrastate, nonnavigable, isolated waters are not "waters of the United States" within the meaning of the CWA, and that EPA had exceeded its authority under the Act by asserting regulatory jurisdiction over such areas. See *id.* at 1316; Pet. App. 2a-3a. The specific wetlands and open water areas identified in Paragraph 20A (*i.e.*, "Exhibit 1 areas W2A, W2B, W3, W5B and W9") consisted of those aquatic areas on petitioners' property that the parties agreed were "isolated" and would therefore be excluded from CWA coverage in light of *Hoffman Homes I*. See Gov't C.A. Supp. App. 107.

In September 1992, the court of appeals granted the government's petition for rehearing in *Hoffman Homes*, vacated the original panel opinion, and remanded for settlement negotiations. See 975 F.2d 1554 (7th Cir. 1992). The parties to the present case nevertheless retained Paragraph 20A in the final version of the decree entered in October of that year. See Pet. App. 12a, 39a. Settlement negotiations in *Hoffman Homes* proved unsuccessful, and in July 1993, the Seventh Circuit issued an amended opinion. See *Hoffman Homes, Inc.* v. *Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (1993) (*Hoffman Homes II*). The court in *Hoffman II* ruled against EPA, but on narrower grounds than in *Hoffman Homes I*. The court found insufficient evidence to support the government's contention that the isolated

wetland at issue provided "suitable or potential habitat for migratory birds." *Id.* at 261-262. The court therefore did not decide whether use of isolated waters by migratory birds would constitute a sufficient basis for the exercise of federal regulatory authority under the CWA. See *id.* at 262-263 (Manion, J., concurring in judgment).

c. In September 1995, after petitioners failed to meet the consent decree's deadlines for creating replacement wetlands, the government moved to enforce the decree. The district court ordered petitioners to comply with the consent decree and imposed civil penalties of approximately $1.3 million pursuant to Paragraph 55 of the decree (Pet. App. 52a-53a), which stipulated the amount of penalties to be assessed in the event of a violation. See *United States* v. *Krilich*, 948 F. Supp. 719 (N.D. Ill. 1996) (*Krilich I*). However, the district court rejected the government's contention that petitioners had violated the decree by discharging fill material into Exhibit 1 area W9. Paragraph 20A of the consent decree provided that, upon completion of the proceedings in *Hoffman Homes*, petitioners' obligations under the decree would not extend to area W9 unless "pertinent portions" of the Seventh Circuit's decision in *Hoffman Homes I* had been "reversed." Pet. App. 39a; see p. 4, *supra*. The district court in *Krilich I* held that the "pertinent portions" of *Hoffman Homes I* had not been "reversed" within the meaning of Paragraph 20A when the panel opinion was vacated and superseded by *Hoffman Homes II*. *Krilich I*, 948 F. Supp. at 725; see Pet. App. 5a-6a.

The court of appeals affirmed the judgment of liability but remanded for a downward adjustment of the penalty amount to $1,257,500. See *United States* v. *Krilich*, 126 F.3d 1035 (7th Cir. 1997) (*Krilich II*). On

December 15, 1997, the district court entered a modified judgment against petitioners. Pet. App. 18a.

d. In November 1998, petitioners moved to bar enforcement of the stipulated penalty. *United States* v. *Krilich*, No. 92 C 5354, 1999 WL 182333 (N.D. Ill. Mar. 25, 1999) (*Krilich III*); see Pet. App. 18a. Petitioners argued that the district court lacked jurisdiction to enforce the consent decree because the wetlands on petitioners' property were not "waters of the United States" under the CWA and were beyond the scope of federal regulatory authority under the Commerce Clause. See *Krilich III*, 1999 WL 182333, at *1-*2. Petitioners also contended that the consent decree should be vacated in light of a "change in the law" reflected in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). See *Krilich III*, 1999 WL 182333, at *3. The district court rejected petitioners' claims, ruling that petitioners were not entitled to relief under Federal Rule of Civil Procedure 60(b)(4) or (5).[2] See *Krilich III*, 1999 WL 182333, at *3.[3]

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[2] Under Rule 60(b)(4) and (5), a district court may "relieve a party * * * from a final judgment, order, or proceeding" where "(4) the judgment is void" or "(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(4) and (5).

[3] In rejecting petitioners' collateral attack on the consent decree, the district court noted, *inter alia*, that:

> The jurisdictional issue that is now raised could have been raised by [petitioners] at the time *Krilich I* was being litigated. More importantly, there is nothing in the Decree nor any other pleadings filed prior to [petitioners'] present motion that makes it apparent that the mitigation plan may have been

Petitioners appealed the district court's ruling with respect to Rule 60(b)(4), and the court of appeals affirmed. See *United States* v. *Krilich*, 209 F.3d 968 (7th Cir. 2000) (*Krilich IV*). The court of appeals explained that, even if petitioners were correct in arguing that the pertinent wetlands fell outside the scope of federal regulatory authority under the CWA, such a defect in the government's enforcement action would not deprive the district court of subject matter jurisdiction and thus would not render the judgment "void" within the meaning of Rule 60(b)(4). *Id.* at 972-973. This Court denied petitioners' petition for a writ of certiorari. See 531 U.S. 992 (2000).

3. In February 2001, after this Court's decision in *SWANCC*, petitioners again moved to vacate or modify the consent decree. Petitioners alleged that all of the wetlands and open water areas on the relevant property are intrastate, nonnavigable, and isolated.[4] They argued that "the execution and enforcement of the Consent Decree by the EPA [was therefore] an *ultra vires* act and the Consent Decree was void *ab initio*."

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based solely on the filling of isolated wetlands. Neither was there any information indicating that those wetlands' only possible connection to interstate commerce was their occasional use by migratory birds.

1999 WL 182333, at *2.

[4] Petitioners submitted the affidavit of an expert witness who expressed the view that the wetlands at issue were "hydrologically isolated during significant parts of the year." Pet. App. 74a. Although the government disputed the validity of that testimony, see *id.* at 22a, the government did not submit contrary evidence because it maintained that petitioners had waived their right to litigate the factual characteristics of those wetlands by stipulating in the consent decree to their status as "waters of the United States" under the CWA.

Pet. App. 7a. Petitioners also claimed that they were entitled to modification of the decree under Rule 60(b)(5) because this Court's decision in *SWANCC* represented a change in the law warranting relief from the judgment. *Ibid.*

The district court denied petitioners' motion. Pet. App. 17a-33a (*Krilich V*). The court stated that, for purposes of deciding the present motion, "it will be assumed that the waters at issue actually are nonnavigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water." *Id.* at 22a. The court concluded that, even if petitioners could prove those factual allegations, they would not be entitled to relief from the prior judgment.

With respect to Rule 60(b)(5), the district court ruled that *SWANCC* did not represent a change in the law relevant to this case because the parties had drafted the consent decree "in light of controlling [circuit] precedent [*i.e.*, *Hoffman Homes I*] that was no less favorable to [petitioners] than *SWANCC*." Pet. App. 32a. The court stated that "[e]quity does not require that the Decree be reopened so that defendants may now litigate whether the wetlands on the property are actually isolated. Defendants chose not to do so more than eight years ago and the legal framework has not changed in a manner that would justify doing it today." *Id.* at 32a-33a. The district court further explained that the government had "a colorable basis * * * for finding the wetlands subject to CWA regulation," and "a colorable basis for the wetlands being subject to CWA regulation should be enough to defeat the present *ultra vires* contention." *Id.* at 28a.

4. The court of appeals affirmed. Pet. App. 1a-16a.

The court of appeals explained that a party seeking to reopen a consent decree on the ground that "it is no

longer equitable that the judgment should have prospective application," Fed. R. Civ. P. 60(b)(5), "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Pet. App. 10a (quoting *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992)). "A party may meet the initial burden of establishing a significant change in circumstances 'by showing a significant change either in factual conditions or in law.'" *Ibid.* (quoting *Rufo*, 502 U.S. at 384). The court of appeals agreed with the district court that *SWANCC* did not constitute a significant change in the law applicable to this case for purposes of Rule 60(b)(5) because "the Consent Decree was drafted in light of a law (as enunciated in *Hoffman Homes I*) that was as favorable to [petitioners] as was the later *SWANCC* decision." Pet. App. 12a. The court of appeals concluded:

> If a party believes that the waters at issue on his own property are not properly subject to the EPA's authority, whether under the rationale of *Hoffman Homes I*, *SWANCC* or under some other theory, he should not stipulate otherwise. But that is exactly what [petitioners] did, to [their] continued dismay. [They] expressly agreed that certain waters on [their] property constituted "waters of the United States," subject to regulation by the EPA. Like most parties that enter into a settlement or plea agreement, [they] presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation. Accordingly, we conclude that *SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree. Nor does *SWANCC* establish that

> the EPA's entry into and continued enforcement of the Consent Decree are *ultra vires* acts. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in . . . litigation."

Pet. App. 14a-15a (quoting *Rufo*, 502 U.S. at 389).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Federal Rule of Civil Procedure 60(b) provides that, under specified circumstances, the court "may" relieve a party from a final judgment "upon such terms as are just." "Rule 60(b), which authorizes discretionary judicial revision of judgments * * *, does not impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power * * * to set aside a judgment whose enforcement would work inequity." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995). To provide a basis for relief from judgment under Rule 60(b)(5), a party must demonstrate "a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384. The court of appeals correctly held that petitioners had failed to satisfy that standard.

In negotiating and drafting the consent decree in the instant case, the parties treated the decision in *Hoffman Homes I*, which had held that isolated wetlands lie outside the coverage of the CWA, as controlling circuit precedent. Thus, Paragraph 20A of the consent decree provided that petitioners' obligations under the decree

would not extend to specified wetland areas unless the decision in *Hoffman Homes I* was "reversed." Pet. App. 39a. The parties stipulated that the remaining wetlands and open water areas on the site were "waters of the United States" covered by the CWA. *Ibid.*

By agreeing to that stipulation, petitioners voluntarily waived their right to litigate any factual or legal issues that may have existed concerning the application of the CWA to the wetlands and open water areas covered by the consent decree. See *Krilich IV*, 209 F.3d at 972; cf. *New Hampshire* v. *Maine*, 532 U.S. 742 (2001) (party was judicially estopped from asserting a position in a subsequent proceeding contrary to the position it agreed to in a consent decree entered by the court in the same case). In return, petitioners received the substantial benefits associated with settling the enforcement action against them, including finality and repose and avoidance of the costs of litigation. "Like most parties that enter into a settlement or plea agreement, [petitioners] presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation." Pet. App. 15a.

Ten years after agreeing to that stipulation, petitioners seek to introduce evidence that none of the wetland and open water areas covered by Paragraph 17 of the consent decree have a sufficient connection to navigable-in-fact waters to support the exercise of federal regulatory authority. The court of appeals correctly held that "*SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree," Pet. App. 15a, because the rule of law announced in *SWANCC* was not meaningfully different from the rule previously

announced by the Seventh Circuit in *Hoffman Homes I*. Petitioners do not even cite *Hoffman Homes I*, let alone attempt to explain how this Court's decision in *SWANCC* represented a sufficient departure from the Seventh Circuit's prior analysis to provide a basis for relief from judgment under Rule 60(b)(5).[5]

The only other court of appeals to address a post-*SWANCC* effort to reopen a CWA Section 404 consent decree reached the same conclusion as did the court below. See *United States* v. *Interstate Gen. Co., L.P.*, 39 Fed. Appx. 870 (4th Cir. 2002) (*IGC*). *IGC* involved both a motion under Rule 60(b)(5) to reopen a civil consent decree and a motion for a writ of coram nobis to set aside a criminal plea agreement. *Id.* at 871. As in this case, the parties in *IGC* entered into negotiated agreements in light of circuit precedent that had held isolated wetlands to be beyond the scope of federal regulatory authority under the CWA. *Id.* at 873; see *United States* v. *Wilson*, 133 F.3d 251, 256-257 (4th Cir. 1997). In light of that circuit precedent in effect at the time the parties entered into the consent decree, the court of appeals in *IGC* concluded that "*SWANCC* effected no relevant change in decisional law in this circuit," and it affirmed the district court's denial of the defendants' motions. 39 Fed. Appx. at 874.

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[5] Although the judgment in *Hoffman Homes I* was vacated and the initial panel opinion was superseded by the opinion in *Hoffman Homes II*, the district court in *Krilich I* specifically held that *Hoffman Homes I* had not been "reversed" within the meaning of Paragraph 20A of the Consent Decree. 948 F. Supp. at 725; see Pet. App. 5a-6a. That holding substantially benefitted petitioners, since it meant that their obligations under Paragraph 17 of the decree did not extend to the wetland areas specifically identified in Paragraph 20A.

2. Petitioners seek review of the question "[w]hether the court of appeals erred in holding * * * that the federal government has the statutory and constitutional authority to regulate non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water." Pet. i (internal quotation marks omitted). The instant case does not present that question, however, because the court of appeals did not issue the holding that petitioners attribute to it. The court of appeals did not construe the term "waters of the United States" to encompass isolated wetlands lacking a surface connection to navigable-in-fact waters, and it did not suggest that the federal government could exercise regulatory authority over such wetlands in the face of a timely challenge to the assertion of federal power. Rather, the court simply held that petitioners had identified no relevant change in fact or law since the entry of the Consent Decree, and that petitioners were therefore bound by their prior stipulation that the wetlands at issue here are "waters of the United States" within the meaning of the CWA.

Petitioners are also wrong in suggesting (Pet. 9) that the courts of appeals are "deeply divided" over the scope of federal regulatory authority under Section 404 of the CWA. Since this Court's decision in *SWANCC*, only two courts of appeals have squarely addressed whether particular water bodies are "waters of the United States." In *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the court of appeals held that the plaintiff had failed to establish that a seasonal creek with a questionable surface water connection to the nearest navigable-in-fact water body qualified as a "water of the United States" under the Oil Pollution

Act (OPA).[6] See *id.* at 270-271 (noting the lack of record evidence as to the characteristics of the creek in question, including "whether the creek ever flows directly (above ground) into the Canadian River"). In *Headwaters, Inc.* v. *Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), the court of appeals concluded that certain nonnavigable, man-made canals that had a direct surface connection to other "waters of the United States" were subject to regulation under the CWA as "tributaries" of navigable-in-fact waters. *Id.* at 533-534; accord *Community Ass'n for Restoration of the Env't* v. *Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002). The holdings of those decisions are not inconsistent with each other, and neither decision in any way conflicts with the Seventh Circuit's ruling in the instant case, which rested on the distinct ground that petitioners had not established a change in the law warranting reopening of the consent decree.

3. Petitioners contend (Pet. 19-26) that the Consent Decree at issue here should be treated as void *ab initio* on the ground that the relevant wetlands lie outside federal regulatory authority under the CWA. Petitioners assert (Pet. 22) that "where a government's execution of a contract constitutes an *ultra vires* act, the contract itself is void *ab initio* and has no legal effect." Petitioners do not and could not plausibly contend, however, that the federal government lacks authority to negotiate voluntary settlements of CWA enforcement actions. The instant case is therefore readily distinguishable from cases in which the invalid-

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[6] The court in *Rice* held that Congress generally intended the terms "navigable waters" and "waters of the United States" to have "the same meaning in both the OPA and the CWA." 250 F.3d at 267.

ity of the relevant government contract is apparent on the face of the agreement. Petitioners also cite no case suggesting that the question whether particular geographic areas are "waters of the United States" cannot be the subject of a legally binding stipulation between the parties.

Under petitioners' theory, the district court was required to conduct a potentially time-consuming inquiry into the physical characteristics of the relevant waters, notwithstanding petitioners' prior litigating decision to enter into a negotiated settlement rather than contest EPA's assertion of regulatory authority. Petitioners seek to escape the effects of their prior stipulation, moreover, even though they can identify no change in either the facts or the law bearing on the propriety of federal regulatory authority. Petitioners' theory has no basis in precedent and would, if accepted, substantially complicate efforts to achieve consensual resolution of federal enforcement actions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2003

(5)

Supreme Court, U.S.
FILED
MAR 25 2003
CLERK

No. 02-915

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v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONERS 1

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *SWANCC* AND IMPLICATES A RECOGNIZED SPLIT IN THE LOWER COURTS 3

II. THE CONSENT DECREE WAS VOID *AB INITIO* BECAUSE FEDERAL REGULATORS LACK STATUTORY OR CONSTITUTIONAL AUTHORITY OVER PETITIONERS' NON-NAVIGABLE, ISOLATED WETLANDS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Page**

Augusta Aviation, Inc. v. *United States*, 671 F.2d 445 (11th Cir. 1982) 8

FD & P Enterprises v. *United States Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003) 4

Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) .. 8

Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) 4, 5

Hoffman Homes, Inc. v. *Administrator, United States EPA*, 961 F.2d 1310, *vacated*, 975 F.2d 1554 (7th Cir. 1992) 2

New Hampshire v. *Maine*, 532 U.S. 742 (2001) 8

Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) 4, 5

Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) 2

Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... *passim*

United States v. *Lamplight Equestrian Ctr., Inc.*, 2002 WL 360652 (N.D. Ill. Mar. 8, 2002) 5

TABLE OF AUTHORITIES-continued

Statute, Regulation, and Rule: **Page**

33 U.S.C. § 1344 ..... *passim*

33 C.F.R. § 328.3(a)(3) 5, 7

Fed. R. Civ. P. 60(b)(5) 1, 2, 7, 9

Miscellaneous:

Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003) 3, 6

Virginia Albrecht & Stephen Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, SH018 ALI-ABA 249 (2002) 5

Lawrence Liebesman & Stuart Turner, *Summary of Federal Court Decisions Interpreting the Supreme Court's 2001 Decision of Solid Waste Agency of Northern Cook County v. Corps*, SG096 ALI-ABA 207 (2002) 5

REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari raises two issues arising from petitioners' 1992 Consent Decree settlement with federal environmental regulators. First, the Seventh Circuit refused to vacate the decree only by taking an exceptionally narrow view of this Court's decision in *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). The court of appeals read *SWANCC* to give federal regulators authority over even "non-navigable, isolated wetlands"—like petitioners'—that have "no surface connection to the nearest stream or nearest navigable body of water." Pet. App. 10a. This reading is at odds with *SWANCC* and implicates a recognized split of authority in the lower courts. Second, the Seventh Circuit held petitioners to their stipulation that federal authorities could regulate petitioners' isolated wetlands. On this score, the court of appeals blatantly ignored jurisprudence from this and other courts refusing to enforce consent decrees or other contracts[1] that purport to expand the scope of federal regulatory power beyond its statutory and constitutional limits.

Remarkably, the government's response pays only scant attention to these important issues. The bulk of the government's argument (at 11-13) is devoted instead to the claim that petitioners do not qualify for relief under Fed. R. Civ. P. 60(b)(5)—an issue that has no bearing on either question presented.[2] While petitioners strongly disagree, their position before this Court—like their argument before the

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[1] As the petition for certiorari explains (at 22 n.6), this Court has repeatedly held that consent decrees are construed basically as contracts for enforcement purposes.

[2] Rule 60(b)(5) provides, in pertinent part, that a "court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" if "it is no longer equitable that the judgment should have prospective application."

district court and Seventh Circuit—does not rely on the change in law that Rule 60(b)(5) requires.[3] The Consent Decree itself gives the district court ongoing jurisdiction "to interpret, enforce, or modify [the] Decree," Pet. App. 35a, and the contract is void *ab initio*, regardless of whether *SWANCC* changed Seventh Circuit law, because it purports to give federal regulators authority beyond statutory and constitutional limits. Accordingly, the government's protracted argument that *SWANCC* did not change Seventh Circuit law has no bearing on petitioners' claim.[4]

The government ultimately spends only three paragraphs on the two issues that are raised in the petition. In a single paragraph, the government claims that the recognized split of authority over the meaning of *SWANCC* does not exist. In the final two paragraphs of its brief, the government simply asserts, without authority, that private parties can consent to federal regulatory jurisdiction beyond regulators' statutory and

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[3] This Court held in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), that a party seeking relief under Rule 60(b)(5) "may meet its initial burden by showing * * * a significant change either in factual conditions or in law."

[4] In fact, *SWANCC*'s definition of "isolated" waters is far more extensive than the definition recognized in *Hoffman Homes, Inc.* v. *Administrator, United States EPA*, 961 F.2d 1310 (*Hoffman Homes I*), *vacated*, 975 F.2d 1554 (7th Cir. 1992), the governing Seventh Circuit case when the parties negotiated the Consent Decree. Under *Hoffman Homes I*, "isolated" wetlands have "no hydrological connection to any body of water * * * no relationship or interdependence with any other body of water * * * are not part of an aquatic ecosystem and do not control floods or pollution in other bodies of water." *Id.* at 1314. *SWANCC*'s definition is far broader. Unlike *Hoffman Homes I*, *SWANCC* does not limit "isolated" waters to areas without any hydrological connection to another body of water. Likewise, whereas *Hoffman Homes I* defines "isolated" waters as those without any relationship or interdependence with another water, "isolated" waters under *SWANCC* include areas that are tenuously but not "significantly" tied to navigable waters.

constitutional authority. See Br. in Opp. 15-16. Neither of these points withstands even superficial scrutiny.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *SWANCC* AND IMPLICATES A RECOGNIZED SPLIT IN THE LOWER COURTS.

The government boldly asserts that the courts of appeals are not "'deeply divided' over the scope of federal regulatory authority under Section 404 of the CWA." Br. in Opp. 14. In fact, this split has been recognized again and again not only by lower courts and legal scholars, see Pet. 14-15, but by the government itself. On January 15, 2003, the Army Corps of Engineers and the Environmental Protection Agency, the very regulators involved in this case, issued an "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States.'" 68 Fed. Reg. 1991 ("Notice"). The Notice expressly recognizes the divide among the courts of appeals over the meaning of *SWANCC*: "While a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and nonnavigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case." *Id.* at 1996. As a result, the Notice recognizes that a number of "uncertainties" exist following *SWANCC* and proposes that field staff seek formal approval from headquarters before asserting jurisdiction over certain isolated waters. *Id.* at 1996, 1997.

The Notice proceeds to discuss the circuit split at length. As to the specific issue of tributaries, for example, it concedes that while a number of courts have held that "*SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters[,] * * * some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and

waters immediately adjacent to navigable waters are involved." 68 Fed. Reg. at 1997 (citing both *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), and the Seventh Circuit's decision in this case as examples of the former and *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 265, 268-271 (5th Cir. 2001), as an example of the latter). This Notice was issued nearly two months before the government filed its brief in this Court—a brief that incredibly tries to disavow the split. The government's position before this Court is at best gross error and at worst disingenuous.

Indeed, the government (Br. in Opp. 14-15) even takes issue with the very divide discussed in the Notice—the split between the Fifth Circuit's decision in *Rice* and the Ninth Circuit's opinion in *Headwaters*. The government argues that these decisions "are not inconsistent with each other, and neither decision in any way conflicts with the Seventh Circuit's ruling in the instant case." Br. in Opp. 15. This remarkable statement not only flies in the face of the government's public Notice, but also is patently untrue. In *Rice*, 250 F.3d at 269, the Fifth Circuit fashioned a bright-line jurisdictional rule: "[u]nder [*SWANCC*], it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." By contrast, the Ninth Circuit adopted an "effects test" in *Headwaters*. This standard asks whether the waters in question have a significant connection to, or effect upon, a navigable body of water.

The stark difference between these two interpretations has been the subject of several judicial opinions and scholarly articles.[5] See *FD & P Enterprises* v. *United States Army Corps*

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[5] The government tries to sidestep this issue by briefly recounting the facts of *Rice* and *Headwaters* before its conclusory claim that "[t]he holdings of those decisions are not inconsistent with each other." Br. in Opp. 14-15. This bald statement ignores the well-recognized, irreconcilable difference between the Fifth and Ninth Circuit interpretations of *SWANCC*.

of Eng'rs, 239 F. Supp. 2d 509, 513-515, 516-517 (D.N.J. 2003) (recognizing circuit split, specifically the divide between Fifth and Ninth Circuits, and reading *SWANCC* to require a look at "whether there is a substantial nexus—beyond a mere hydrological connection—between the FD & P Property" and the navigable water at issue); *United States* v. *Lamplight Equestrian Ctr., Inc.*, 2002 WL 360652, at *5 (N.D. Ill. Mar. 8, 2002) (finding that *Rice* and *Headwaters* reached "opposite" conclusions); Lawrence Liebesman & Stuart Turner, *Summary of Federal Court Decisions Interpreting the Supreme Court's 2001 Decision of Solid Waste Agency of Northern Cook County v. Corps*, SG096 ALI-ABA 207, 215 (2002) ("The split in interpretation among the courts wrestling with the *SWANCC* decision was deep and instantaneous"; "the 5th and the 9th [Circuits] split over this issue"); Virginia Albrecht & Stephen Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, SH018 ALI-ABA 249, 285 n.128-131 (2002) (highlighting split between *Rice* and *Headwaters*); see also Pet. 14-15.

It is likewise unquestionable that *Rice* and *Headwaters* are irreconcilable with the Seventh Circuit's finding in this case that the Migratory Bird Rule was the only casualty of *SWANCC*. Under the Seventh Circuit's ruling, *SWANCC* permits federal authorities to regulate isolated waters so long as the Migratory Bird Rule is not the express predicate for federal jurisdiction.[6] Thus, while the Fifth and Ninth Circuits (albeit

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[6] Even the Notice disagrees with the Seventh Circuit's interpretation, reading *SWANCC* to reject more than just the Migratory Bird Rule: "[I]n light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce)." As a result, the Notice requests comments on whether and under what circumstances the factors listed in § 328.3(a)(3)(i)-(iii) or any other factors "provide a basis for

for different reasons) would prohibit federal regulation of petitioners' wetlands—isolated areas with no significant nexus to a navigable water—the Seventh Circuit allows it.

In an apparent effort to distract from this obvious conflict, the government mischaracterizes the Seventh Circuit's decision below:

> The court of appeals did not construe the term "waters of the United States" to encompass isolated wetlands lacking a surface connection to navigable-in-fact waters, and it did not suggest that the federal government could exercise regulatory authority over such wetlands in the face of a timely challenge to the assertion of federal power. Rather, the court simply held that petitioners had identified no relevant change in fact or law since entry of the Consent Decree, and that petitioners were therefore bound by their prior stipulation that the wetlands at issue here are "waters of the United States" within the meaning of the CWA.

Br. in Opp. 14. This reading disregards large sections of the Seventh Circuit's opinion. The court of appeals held—notwithstanding its express assumption "that all waters at issue were nonnavigable, isolated wetlands with no surface connection to the nearest stream or nearest navigable body of water"—that *SWANCC* "does [not] establish that the Government exceeded its authority in entering into the Consent Decree." Pet. App. 10a, 16a. The government ignores this language, which reads *SWANCC* to permit federal regulation of isolated waters with "no surface connection to the nearest stream or nearest navigable body of water."

In fact, the Seventh Circuit expressly rejected petitioners' claim that *SWANCC* "removed from the [Army Corps of

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determining CWA jurisdiction over isolated, intrastate, non-navigable waters." 68 Fed. Reg. at 1994, 1996.

Engineers'] regulatory authority all waters that are not adjacent to bodies of open water"—*i.e.*, waters that are neither navigable themselves nor adjacent to a navigable waterway. Pet. App. 13a. In the Seventh Circuit's view, "the precise holding of *SWANCC* was not so broad"; "in *SWANCC*, the Supreme Court merely held that the definition of 'waters of the United States' under 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, 'exceeds the authority granted to [the Corps] under § 404(a) of the CWA.'" *Ibid.* (quoting *SWANCC*, 531 U.S. at 174).

From the foregoing, it is plain that the Seventh Circuit's ruling is much broader than the government describes. The decision below narrowly interprets *SWANCC* and expressly applies this narrow reading to the instant case, holding that *SWANCC* does not preclude federal regulation of isolated wetlands like petitioners'. This holding is entirely independent of the court's ruling on the application of Rule 60(b)(5) and the attendant question whether there had been a "relevant change in fact or law." See Pet. App. 16a (discussing points separately).

II. THE CONSENT DECREE WAS VOID *AB INITIO* BECAUSE FEDERAL REGULATORS LACK STATUTORY OR CONSTITUTIONAL AUTHORITY OVER PETITIONERS' NON-NAVIGABLE, ISOLATED WETLANDS.

The government fails to address any of the numerous decisions petitioners cite from this Court and other courts for the rule that parties cannot contractually expand the scope of federal authority. See Pet. 20-26. The crux of the government's response on this issue is a single sentence: "Petitioners do not and could not plausibly contend * * * that the federal government lacks authority to negotiate voluntary settlements of CWA enforcement actions." Br. in Opp. 15. This is a red herring. Of course petitioners do not assail the government's right to settle cases. Petitioners challenge its

asserted right to enter into settlements that give federal regulators ongoing authority over wetlands that are beyond the regulators' statutory or constitutional jurisdiction. The government can settle cases, but it cannot use settlements to breach the legal limits on its regulatory power.

A decision the government cites in passing earlier in its brief is thus wholly irrelevant. The government invokes *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), for the unremarkable proposition that a party can be "judicially estopped from asserting a position in a subsequent proceeding contrary to the position it agreed to in a consent decree entered by the court in the same case." Br. in Opp. 12. The position that bound the State of New Hampshire in that case involved the location of its boundary with Maine; the case had nothing to do with federal regulatory authority, let alone the ability to expand this power by contract.

The government also misses the mark with its passing claim that this case is "readily distinguishable from cases in which the invalidity of the relevant government contract is apparent on the face of the agreement." Br. in Opp. 15-16. The government complains that petitioners' theory would force the district court "to conduct a potentially time-consuming inquiry into the physical characteristics of the relevant waters." *Id.* at 16. In fact, decisions cited in the petition struck down contracts because *underlying* facts made them unenforceable. For example, the insurance contract in *Federal Crop Ins. Corp.* v. *Merrill* was not deficient on its face. The Court held that it was void *ab initio* in light of a fact—that most of the insured acres had been reseeded with spring wheat—that was not disclosed in the insurance application. 332 U.S. 380, 382 (1947) ("The formal application itself did not disclose that any part of the insured crop was reseeded"). Likewise, the government agent in *Augusta Aviation, Inc.* v. *United States* acted without authority when it promised veteran education funds in an amount in excess of what the former soldier had earned. 671 F.2d 445, 448-450 (11th Cir. 1982). Once again, an underlying

fact—there the veteran's period of military service—deprived the government agent of contracting authority. Accordingly, the fact that petitioners' claim depends on underlying facts—*i.e.*, the characteristics of the wetlands—is of no moment.

Finally, the government argues as a matter of policy that petitioners' position "would, if accepted, substantially complicate efforts to achieve consensual resolution of federal enforcement actions." Br. in Opp. 16. If the government's point is that petitioners would undermine the permanency of consent decrees, these contracts are already vulnerable to modification under Rule 60(b)(5) when relevant legal or factual changes occur. The well-recognized limits on federal authority on which petitioners rely merely encourage federal regulators to ensure that they have jurisdiction under existing law before executing a contract that gives them ongoing regulatory power. This is hardly an undesirable "complicat[ion]" of the settlement process. It is a rule that discourages agencies from exceeding statutory and constitutional limits on their authority by threatening litigation and coercing a settlement that concedes unlawful agency jurisdiction.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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MARCH 2003